(29,068)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 518.

THE UNITED STATES OF AMERICA *EX REL.* MICHAEL BILOKUMSKY, APPELLANT,

vs.

ROBERT E. TOD, COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK, *ET AL.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 M. 7—81.

Writ of Habeas Corpus.

The President of the United States of America to Robert E. Todd, Immigration Commissioner at Ellis Island, New York Harbor, Greeting:

We command you that you have the body of Michael Bilokumsky alias Michael Bialokowsky, or by whatever name he shall be called, before the Honorable United States District Judge, at Room 235 Federal Bldg., in the Borough of Manhattan, City of New York, Southern District of New York, on the 31st day of March, 1922, at 10:30 o'clock in the forenoon of said day, to do and receive what shall then and there be considered concerning this purpose.

And we further command you that you certify fully and at large to the said Court at the said time and place, the cause of the imprisonment and detention of the said Michael Bilokumsky, by whatever name he shall be called or held, and have you then — there this Writ.

Witness the Honorable Learned Hand, one of the Judges of the United States District Court for the Southern District of New York, at New York, the 25th day of March, 1922.

ALEX. GILCHRIST, JR.,
Clerk.

The above writ is hereby allowed.

Dated, New York, March 24, 1922.

JNO. C. KNOX,
United States District Judge.

HALE, NELLES & SHORR,
Attorneys for the Relator.

80 East 11th Street, New York City.

U. S. District Court. Filed April 12, 1922.

2 *Petition for Writ of Habeas Corpus.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA EX REL. MICHAEL BILOKUMSKY, Relator,

against

ROBERT E. TODD, Commissioner of Immigration at the Port of New York, Respondent.

The petition of Michael Bilokumsky respectfully shows:

(1) Your petitioner is now detained at the New York Immigration Station at Ellis Island, New York Harbor. On information and

belief, he is not committed or detained by virtue of any process or mandate issued by any court of the United States or by any judge thereof; or by virtue of the final judgment or decree of a competent tribunal of criminal or civil jurisdiction, or the final order of such tribunal made in a special proceeding instituted for any cause except punishment for contempt; or by virtue of any execution or other process issued upon such a judgment, decree or final order.

(2) The cause or pretense of the imprisonment or restraint of your petitioner, to the best of his knowledge and belief, is a certain deportation warrant, a copy of which is hereto annexed and marked Exhibit A, reciting that the Acting Secretary of Labor has become satisfied that your petitioner should be deported on one or various of the grounds provided by the Act of October 16, 1918 as amended by the Act of June 5, 1920. Your petitioner does not admit
3 that said finding was in any respect just, but he is advised by counsel that as to one of the acts alternatively specified in said warrant (viz., knowingly having in possession for the purpose of circulation printed matter advocating the overthrow by force and violence of the government of the United States) the evidence at the hearing before the Immigration Inspector was such that this Court on habeas corpus will not hold that the finding was without evidence. Upon information and belief, the evidence upon this point was in substance and effect as follows: that on April 26, 1921, a police officer observed your petitioner in company with another person on a street in Philadelphia; that his suspicion was aroused because they were close together and were foreigners and had stopped and looked up the street; that your petitioner's companion distributed upon door-steps nine copies of a circular, printed in English; that said circular advocated the overthrow by force and violence of the government of the United States; that your petitioner and his companion were arrested and searched; that nine copies of said circular were found between your petitioner's coat and waistcoat, under his arm-pit, so bestowed that they fell to the floor when he removed his coat; that a number of stickers printed in English and advocating Bolshevism were found in your petitioner's socks.

(3) Upon information and belief, said deportation warrant (Exhibit "A") recites and purports to find that your petitioner is and was an alien. Upon information and belief, said finding was based upon proceedings taken and evidence obtained by the Department of Labor in violation of the rights to security of person
4 and due process of law guaranteed by Articles IV and V of Amendments to the Constitution of the United States. Upon information and belief, on April 29, 1921, and theretofore and thereafter, the rules of the United States Department of Labor, Bureau of Immigration, with respect to deportation proceedings contained the following provisions:

"Rule 22, Subdivision 5 (*a*).—Upon receipt of a telegraphic or written warrant of arrest the alien shall be taken before the person or persons therein named or described and granted a hearing to enable him to show cause, if any there be, why he should not be de-

ported. If the alien is unable to speak or understand English, an interpreter should be employed where practicable. * * *

"Rule 22, Subdivision 5 (*b*).—At the beginning of the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued, and shall be apprised that he may be represented by counsel. The alien shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the conduct of the hearing."

Upon information and belief, on April 29, 1921, no warrant of the Secretary of Labor for your petitioner's arrest had been issued, and no such warrant was issued until May 19, 1921. From April 26 to May 19, 1921, your petitioner was confined in Moyemensing Prison at Philadelphia, Pennsylvania, under process of the state of Pennsylvania. At said prison on April 29, 1921, your petitioner was brought before one Charles B. Reiss, Immigrant Inspector, an official and employee of the United States Department of Labor, and the said Reiss commanded your petitioner to be sworn and to answer his questions. Your petitioner was not served with or shown or allowed to inspect any warrant of arrest or other document; was not apprised that he might be represented by counsel; and was not required to state whether he desired counsel or waived the same. Upon information and belief, your petitioner's attorney was not notified of said hearing or permitted to be present thereat. Your petitioner was not advised that he could not lawfully be compelled to attend and answer, but on the contrary was compelled to attend by prison guards and commanded to answer by said Immigration Inspector. Upon information and belief, the following is a copy of said Inspector's record of the examination of your petitioner upon said occasion:

EXHIBIT J-1.

Meyamensing Prison,

Philadelphia, Pa.

April 29, 1921.

Alien duly sworn, testifies as follows:
Zinorey Dorofuychuk, Interpreter.

Q. What is your name?
A. Michael Bilokumsky.
Q. What is your age, and where were you born?
A. 27 years old; born Nov. 30, 1894.
Q. Where were you born?
A. Village of Andrievka, town of Ampol, Province of Podolskaya, Russia.

Q. Where do you live?
A. 617 Jackson Street, Philadelphia, Pa.
Q. What kind of work do you do?
A. Caster in brass foundry.
Q. Are you married?
A. No, sir.
Q. What is your race and nationality?
A. Russia; race Russian.
Q. How long have you been in the United States?
A. 8½ years.
Q. At what port did you arrive; date and ship?
A. Philadelphia; S. S. "Merian", Nov. 10, 1912.
Q. Have you been in the United States continuously since that time?
A. Yes sir.
Q. When were you arrested and where?
A. Fifth below Fairmouth Avenue, last Monday April 25th.
Q. Where were you arrested that time?
A. Was working in Fairmouth avenue and they arrested me in the restaurant.
Q. What were you doing that occasioned your arrest?
A. I was working; I did not do anything, and they arrested me.
Q. Were you ever arrested before; were you arrested in any Communist raid?
A. Jan. 2, 1919, at No. 259 6th St. Philadelphia.
Q. Do you belong to any organization?
A. I belonged before to an organization at 414 Green Street.
Q. What was the name of it?
A. Russian Insurance Company.
Q. Do you belong to the Communist Party?
A. No.
Q. Do you believe in the overthrow by force or violence of the government of the United States or of all forms of law?
A. No sir.
Q. Did you ever distribute any literature advocating or teaching the overthrow by force or violence of the government of the United States or of all forms of law?
A. No sir.
Q. Did you publish, or cause to be published, any such literature?
A. No.
Q. Did you ever have any such literature in your possession?
A. No.
Q. Are you an anarchist, or do you believe in anarchy?
A. No sir.
Q. Do you believe in unlawful destruction, injury or damages to property?
A. No sir.
Q. Did you ever take out naturalization papers?
A. Never took out first or full papers.

Certified correct copy of stenographic notes of hearing taken by me.

CHAS. B. REISS,
Immigrant Inspector
(*Examining Inspector and Stenographer*).

7 Your petitioner was thereafter, on or about May 19, 1921, delivered into the custody of the United States Department of labor under a warrant of the Secretary of Labor for his arrest in part based upon said examination by Inspector Reiss. At his subsequent hearing before Inspector Benkhart, referred to in said deportation warrant (Exhibit "A"), your petitioner, by advise of counsel, declined to testify. Inspector Benkhart then said:

"As it is evident that it is impossible to secure information from the alien touching on his status and his right to be and remain in the United States, I will introduce as evidence in this case and make same a part of the record marked Exhibit J a certificate of alien's landing in the United States.

"I also introduce as evidence and make same a part of the record in this case, a copy of sworn statement made by alien in Moyamensing Prison, Philadelphia, Pa., April 29th, 1921, to Charles C. Reiss, Immigrant Inspector,—marked J-1."

Upon information and belief, the record of your petitioner's hearing before Immigrant Inspector Benkhart contains no evidence whatever as to your petitioner's status, citizenship or nationality, except that introduced and obtained as aforesaid.

(4) Upon information and belief, the proceedings in the Department of Labor with respect to your petitioner's deportation were concluded and said warrant of deportation issued on August 8, 1921. Upwards of seven months have elapsed since the issuance of said warrant and the command in said warrant as to your petitioner's deportation has not been complied with. During most of said time your petitioner has been at large on bail, but he is now detained and imprisoned in custody, and upon information and belief there is no likelihood that respondent will be able to effect his deportation within a reasonable time.

8 (5) Upon information and belief your petitioner is deprived of life, liberty, and property without due process of law in violation of Article 5 of Amendments to the Constitution of the United States and has been and now is subjected by respondent to imprisonment or involuntary servitude otherwise than as a punishment for crime, in violation of Article 13 of Amendments to the Constitution of the United States.

Wherefore your petitioner prays that a writ of habeas corpus issue directing and commanding the United States Commissioner of Immigration at Ellis Island and any and all persons under his direction or control, to produce and bring up your petitioner before this Court for hearing and determination by this Court concerning

his wrongful detention and restraint, and that your petitioner may have such other and further relief as may be just in the premises.

MICHAL BILOKOMSKY,
Petitioner.

HALE, NELLES & SHORR,
Attorneys for Petitioner.

Office & P. O. Address, 80 East 11th Street, Borough of Manhattan, City of New York.

9 UNITED STATES OF AMERICA,
State, County and Southern
District of New York, ss:

Michael Bilokumsky, being duly sworn, says that he is the petitioner above named, that he has had translated to him the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true, and that no previous application for this or similar relief has been made by your petitioner.

MICHAL BILOKOMSKY.

Subscribed and sworn to before me this 24 day of March, 1922.

MARY KRUCHKOFF,
Com. of Deeds, N. Y. City.

N. Y. Co. Clerks No. 221.
Com. exp. —— 11, 1923.

UNITED STATES OF AMERICA,
State, County and Southern
District of New York, ss:

Mary Kruchkoff, being duly sworn, says that she is a clerk in the office of Hale, Nelles & Shorr, attorneys for the petitioner herein, and a commissioner of deeds of the City of New York; that she correctly translated and stated the entire contents of the foregoing petition and verification to the relator in the Russian language before its execution by the relator, and that he thereupon duly swore to and executed the same before her.

MARY KRUCHKOFF.

Subscribed and sworn to before me this 24th day of March, 1922.

MURRAY C. BERNAYS,
Notary Public.

New York Co., Clerk's No. 156.
New York Co. Register's No. 4042.
Commission Expires March 30, 1924.

10 EXHIBIT A.

U. S. of America,

Dept. of Labor,

Washington.

Warrant Deportation.

No. 55009/76. Incl. 3742.

To Frederick A. Wallis, Commissioner of Immigration, Ellis Island, N. Y. H., or any Officer or Employee of the U. S. Immigration Service:

Whereas, from proofs submitted to me, after due hearing before Immigrant Inspector A. G. Benkhart, held at Philadelphia, Pa. I have become satisfied that the Alien Michael Bilokumsky, alias Bialokowsky who landed at the port of Phila. Pa. S. S. "Marion" on or about the 10th day of Nov. 1912, has been found in the United States in violation of Act of Oct. 16, 1918, as amended by the Act of June 5, 1920. That he writes, publishes or causes to be written, published or knowingly circulates, distributes, prints, or displays or knowingly causes to be circulated, distributed, printed, published or displayed, or knowingly had in his possession for the purpose of circulation, distribution, circulation, or display written or printed matter, advising, advocating, or teaching the overthrow by force or violence of the Government of the United States or all forces of law; and may be deported in accordance therewith.

I, Theodor G. Risley, acting Secretary of Labor, by virtue of the powers and authority vested in me by the laws of the United States, do hereby command you to return the said alien to Russia, the country whence he came, at the expense of the appropriation: "Expenses of Regulating Immigration 1922." You are directed to purchase transportation for the alien from New York to his home in Russia, at the lowest available rate, payable from the above named appropriation. The alien may be permitted to remain at large under the present outstanding bond until deportation to Russia are in order.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 8th day of August, 1921.

THEODORE G. RISLEY,
Acting as Secretary of Labor.

J. G. W.
J. M. G.

11 [Endorsed:] U. S. District Court. Filed March 25, 1922. S. D. of New York.

12 *Return to Writ of Habeas Corpus.*

J. C. T., Jr. 27948. Gal.

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA ex Rel. NICOLAI MANSEVICH, Relator,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York, Respondent.

Return to Writ of Habeas Corpus.

M. 7/155.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

John M. Lyons being duly sworn, says that he is and during all the times herein mentioned has been an immigrant inspector in the service of the United States; that he is attached to the Law Department of the Immigration Service of the United States at Ellis Island, New York; that he in his official capacity is authorized to make and in behalf of the respondent hereby makes the following return to the writ of habeas corpus herein.

In compliance with the direction of this Court, the body of the said alien in his own proper person is produced herewith before this Court at the time specified in the writ.

It is respectfully urged that upon its face the petition upon which the writ was granted is insufficient in law, and that the writ should therefore be quashed because

(*a*) The petition does not allege facts to show that the proceedings of the Department of Labor upon which was issued the warrant of deportation pursuant to which the said alien is held, were not regular, fair and in compliance with the statute applicable in
13 such cases, nor facts from which this Court can determine that the proceedings were either irregular, unfair or not in compliance with said statute:

(*b*) The petition does not allege any facts which entitled this Court to review the findings and conclusion of the Department of Labor upon which the warrant of deportation was issued;

(*c*) It is not alleged that there was no evidence before the Department of Labor upon which it based or could have based its findings and conclusion in accordance with which the warrant of deportation was issued;

(*d*) It does not appear by allegations of facts that the issues sought by the petition now to be litigated in this Court have not already been determined by the Department of Labor adversely to the said alien

in proceedings which were regular, fair and in compliance with the statute applicable thereto.

As appears by the records of the Department of Labor of the United Sttaes with respect to the above named alien, copies of which are produced and filed herewith as part of this return:

(1) This case begins with the transcript of the hearing given the alien herein by J. S. Apelman, a Special Agent of the Department of Justice. At this hearing, the alien, under oath, stated that he was born in 1886 in Grodno, Poland, formerly Russia; that he arrived in New York in 1911 or 1912. The alien made a signed statement before a representative of the Department of Justice to the effect that he arrived in the United States in 1911 or 1912; that he had been a member of the Professional Union for about eight months paying dues of 25¢ a month and in 1919 was a member of the Union of Russian Workers, Branch 3, Detroit, which organization has in the past been considered an anarchistic one, and was to a great extent broken up by the deportation of many of its leaders during the latter
14 part of 1919. It also appears that the alien was, during 1919, a delegate from a branch of this organization to the Soviet of Workers Deputies and it has been established that he believes in the doctrines and principles of the Union of Russian Workers. The alien on or about the same time made a similar statement to the Immigration Inspector at Detroit and corroborated what had been told to the representative of the Department of Justice. In this statement, which is marked Exhibit "E" and which has been made part of the record, it appears that he admitted that he disbelieves in Government; is opposed to law; that the American Government should receive the same treatment as the Czar's; and that the proper way to bring this about is in armed revolution and in the killing of Government officials.

These facts having been duly transmitted to him, the Assistant Secretary of Labor issued a warrant for the alien's arrest under date of September 6, 1921, it being alleged that he writes, publishes, or causes to be written or published, or knowingly circulates, distributes, prints, or displays, or knowingly causes to be circulated, distributed, printed, published, or displayed, or knowingly had in his possession for the purpose of circulation, distribution, publication, or display, written or printed matter, advising, advocating, or teaching the overthrow by force or violence of the Government of the United States or of all forms of law; that he is an alien anarchist; that he believes in, advises, advocates, or teaches the overthrow by force or violence of the Government of the United States or of all forms of law; and that he writes, publishes, or causes to be written or published, or who knowingly circulates, distributes, prints, or displays or knowingly causes to be circulated, distributed, printed, published, or dis-
15 played, or who knowingly had in his possession for the purpose of circulation, distribution, publication or display, written or printed matter, advising, advocating, or teaching opposition to all organized government. During the course of the hearing the

alien was additionally charged as follows: "With being an alien who believes in, advises, advocates or teaches the duty, necessity or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character, and that he is a member of or affiliated with an organization, association, society or group that advises, advocates, or teaches opposition to all organized Government, or that advocates, advises, or teaches the overthrow by force or violence of the Government of the United States or of all forms of law."

(3) The alien was subsequently accorded a hearing before an Immigration Inspector at which time he admitted substantially all the statements previously made to the Government's representative, waiving his right of counsel. One Hyman Seid testified that he, on an order written on two postal cards which his wife received from two boys, delivered at 11569 Nagel Street, Hamtramck (the alien's home address) three bundles from the office of the American Express Company. The testimony of this witness is corroborated by the testimony of Special Agents of the Department of Justice who were aware of the receipt of this shipment by this alien. They further testified that Mrs. Mansevich, the wife of the accused, admitted to them that on the night prior to delivery of this literature certain men were at her house and made the arrangements relative to the removal
16 of this literature. The alien himself testified that he believed in Government officials in so far as they held positions as teachers but disbelieved in those who believed in arrest and oppression and believed that they should be overthrown and assas-inated.

(4) On September 20, 1921, the Department directed the deportation of the alien it having been found "that he knowingly had in his possession for the purpose of distribution printed matter advocating the overthrow by force or violence of the Government of the United States or of all forms of law and printed matter advocating opposition to all organized Government; that he is an alien anarchist; that he advocates the overthrow by force or violence of the Government of the United States or of all forms of law; that he believes in the necessity or propriety of the unlawful killing of officers of the Government of the United States; that he is a member of an organization that advocates opposition to all organized government, and an organization that advocates the overthrow by force or violence of the Government of the United States or of all forms of law."

(5) As the result of many protests to the effect that the alien did not have a fair hearing, deportation was stayed and a further hearing was had on February 18, 1922, at Detroit, at which time the alien was represented by counsel. The witness Seid testified practically the same as he did at the first hearing and his testimony was not shaken by cross-examination. Special Agent Wilcox of the Department of Justice testified regarding the delivery of the three bundles of literature, the contents of which were copies of the anarchistic magazine "Volna" issue No. 18, a paper which is debarred from the

United States mails. A copy of this paper is incorporated in
17 and made part of the record being marked Exhibit "D," an excerpt from which reads as follows: "Taking part in the every day fight of the laborer we will be able to direct the fight to a general strike in one place, or in the whole country, or in the world and we will be able to prepare our comrades to the thought of the inevitable of the armed fight between the strikers and the employers' hired help called the army, police, militia and secret service or in other words to direct the strike to enter upon the road of revolution. From the knowledge of the revolutionized strikers and from the character and idea of the active minority in their midst, it will depend whether the general strike will turn into the road of social revolution or it will be stuck in the fight of the political parties for their own power." There is further testimony of one Mike Slaszck to the effect that he purchased at the home of the Masses a copy of the Magazine "Volna" No. 17, and that this alien sold same to him during May, 1921. An excerpt from this issue is quoted as follows: "Anarchism means peace and happiness for all. Anarchists with pleasure would renounce of using force. In the present form force is practiced by all, and we recommend the oppressed to use force against force and only against force as a necessary medium of defense."

There appears to be no question as to the anarchistic nature of the paper and of the alien's beliefs as shown by the following answers to questions propounded by his attorney:

"Q. Do you believe all that Volna says?
A. I believe, it, but I don't perform it. I believe in what is written in it.
Q. You believe in what Volna says?
A. I believe in what Volna says, but I don't take any notice and don't want to do it."

Exhibit "E" is a paper written in Russian and purports to be a certificate certifying that the alien was a delegate in the Soviet of Workingmen's Deputies in the City of Detroit from the
18 Union of Russian Laborers, No. 3, Highland Park, Michigan. There is also incorporated in the record documentary evidence showing the anarchistic nature of the Union of Russian Workers and its agreement with the Canadian branch of the organization, as well as the twenty page Manifesto containing a discussion of the evils of the authority of the State and Capitalistic Society and that the principal work of the organization is in the destruction of the State.

In defense of the Government charges the alien denied at the last hearing that he was or had been a member of the Union of Russian Workers or of the Professional Union and also denied that he had "Volna" sent to him for distribution, that he only distributed a few copies to his comrades and that a man with whom he had become acquainted had ordered the delivery of the parcels. It is significant, however, that no effort has apparently been made either by the

alien or his attorney to introduce the testimony of this alleged friend and it would appear, therefore, that the explanation is one which was given to suit the occasion.

(6) The entire record was again reviewed by the Department, who, under date of April 11, again directed the alien's deportation under the outstanding warrant which issued September 30, 1921, the Department having found that the alien:

"Knowingly had in his possession for the purpose of distribution printed matter advocating the overthrow by force or violence of the Government of the United States or of all forms of law, and printed matter advocating opposition to all organized government; that he is an alien anarchist; that he advocates the overthrow by force or violence of the Government of the United States or of all forms of law; that he believes in the necessity or propriety of the unlawful killing of officers of the Government of the United States; that he is a member of an organization that advocates opposition to all organized Government, and an organization that advocates the overthrow by force or violence of the Government of the United
19 States or of all forms of law."

(7) As appears by the minutes and exhibits aforesaid, the said alien was duly informed and apprised of the charges against him; the said alien was afforded a full, complete and fair hearing by the Department of Labor upon said charges; the said alien was afforded a full, complete and fair opportunity to answer and to submit evidence upon such charges; there was before the Department of Labor evidence to sustain each of said charges; the Department of Labor duly found that the charges were sustained; and said charges were in fact fully sustained by the proofs that were before and were considered by the Department of Labor.

(8) The respondent respectfully denies each and every allegation of the petitioner's complaint marked and numbered "Third," "Seventh," "Eighth," "Ninth," "Tenth," "Eleventh" and "Twelfth."

(9) Respondent respectfully denies any knowledge or information thereof sufficient to form a belief as to the truth of the allegations in the petition herein marked and numbered paragraphs "First," "Second" and Fourth."

(10) With respect to allegation marked and numbered "Sixth" of the petition herein and answering same, respondent respectfully alleges, denies that the findings were based upon illegal proceedings taken and evidence obtained in violation of the rights to security guaranteed by Articles 4 and 5 of Amendments to the Constitution of the United States and further denies that the alien herein was commanded to answer questions and to be sworn thereafter and that petitioner was not advised that he could not lawfully be compelled to attend and answer and further denies any knowledge or information sufficient to form a belief thereof as to the truth of the remain-

ing allegations of petition marked and numbered "Sixth,"
20 with the exception admits that Rule 22, Sub-division 5 (*a*) is as stated in the petition, with the exception that the last sentence thereof in the following words "if the alien is unable to speak or understand English, an interpreter should be employed where practicable," respondent alleges that said statement does not appear in the Rules as alleged in said petition. With respect to Rule 22, Sub-division 5 (*b*), respondent respectfully admits that said quotation is part of Rule 22, Sub-division 5 (*b*).

(11) Respondent respectfully alleges that the full record was duly forwarded to the Bureau, together with all written arguments submitted by counsel and the recommendations of the examining officer and the officer in charge for determination as to whether or not a deportation warrant should issue.

Wherefore deponent prays that the writ of habeas corpus herein be dismissed and the said alien remanded to the custody of the Commissioner of Immigration at Ellis Island, New York, to be dealt with in accordance with the said warrant of deportation.

JOHN M. LYONS.

Sworn to before me this 30th day of June, 1922.

(Sgd.) CARL BRECHER.
[SEAL.] CARL BRECHER,
Notary Public, Kings County.

Clerk's No. —.
N. Y. Clerk's No. —.
Commission expires March 30, 1923.

21 [Endorsed:] U. S. District Court. Filed April 12, 1922. J. & D. of N. Y.

22 File No. 4088/15.

136 S. 3rd St.,
Philadelphia, Pa., June 24th, 1921.

Transcript of Testimony Taken in the Case of Michael Bilokumsky, Alias Bialokowski, under Departmental Warrant of Arrest No. 55009/76, May 14th, 1921.

Present:

A. G. Benkhart, Immigrant Inspector.
M. C. Smith, Stenographer.
I. Lasker Greenberg, Counsel for Alien.

Warrant of arrest and evidence on which same was issued is reviewed by counsel.
Warrant of arrest read and explained by Inspector to alien.
Alien is sworn:

(By Inspector to alien:) What is your name?
(By Counsel:) I advise my client not to answer.

Q. What is your age, and when were you born?
A. I advise my client not to answer.
Q. Where were you born?
A. I advise my client not to answer.
Q. Where do you live?
A. I advise my client not to answer.
Q. What kind of work do you do?
A. I advise my client not to answer.
Q. Where do you work?
A. I advise my client not to answer.
Q. Are you married?
A. I advise my client not to answer.
Q. What is your race and nationality?
A. I advise my client not to answer.
23 Q. How long have you been in the United States?
A. I advise my client not to answer.
Q. At what port did you arrive?
A. I advise my client not to answer.
Q. What is the date of your arrival?
A. I advise my client not to answer.
Q. What is the name of the ship you came on?
A. I advise my client not to answer.
Q. Have you been in the United States continuously since that time?
A. I advise my client not to answer.
Q. When were you arrested and where?
A. I advise my client not to answer.
Q. Why were you arrested at this time?
A. I advise my client not to answer.
Q. What were you doing that occasioned your arrest?
A. I advise my client not to answer.
Q. Were you ever arrested before?
A. I advise my client not to answer.
Q. Were you arrested in any Communist raid?
A. I advise my client not to answer.
Q. Do you belong to any organizations?
A. I advise my client not to answer.

(By Inspector:) As it is evident that it is impossible to secure information from the alien touching on his status and his right to be and remain in the United States, I will introduce as evidence in this case and make same a part of the record marked Exhibit J, a certificate of alien's landing in the United States.

I also introduce as evidence and make same a part of the record in this case, a copy of sworn statement made by alien in Moyamensing Prison, Philadelphia, Pa., April 29th 1921 to Chas. C. Reiss, Immigrant Inspector, marked J-1.

24 I will call as a witness in this case Officer THOMAS WILKINSON.

Witness is sworn.

(By Inspector:) What is your name?
A. Thomas Wilkinson.
Q. What is your occupation?
A. Patrolman.
Q. What district?
A. 7th District.
Q. Have you ever seen this alien before?
A. I have.
Q. When and where and under what circumstances?
A. On April 26th 1921, at 5th & Fairmount Avenue.
Q. Did you arrest him?
A. I did.
Q. What for?
A. I saw him accompanying Stolisky (Stolitski) and Stolisky was serving this "May Day Revolution" literature. (Presents a number of circulars printed "May Day of Revolution". I saw him start first at 422 Fairmount Avenue and wind up at 404. They crossed 4th Street. Then Officer Bender got on their trail. About 15 minutes later, they again came west on Fairmount Avenue trailed by Officer Bender, Detectives Moriarity, Plateau and Emanuel. At the Southeast corner of 5th & Fairmount Avenue I placed them under arrest and took them to the 7th District Station House where they were slated and I searched Stolisky. I found in between his stocking and skin two packages of stickers. (Witness presents two packages of assorted stickers.) And under his arm pits between his coat and vest the rest of this literature. (Presents a number of circulars printed "May Day of Revolution".) After we
25 searched them, they were placed in the cell.

Q. Will you positively swear that you saw this person whom you have identified as Bilokumsky, distribute this literature you have presented?
A. No; I didn't see him distribute them.
Q. Do you positively swear that the literature you have presented was found on his person when you searched him?
A. I do.
Q. All this stuff?
A. All this stuff. (Indic*t*aes nine circulars printed "May Day of Revolution".)
Q. You say these nine circulars you found under his arm pit between his vest and coat?
A. Yes.
Q. And these stickers,—where did you say they were found?
A. Between his stockings and his skin. (Indicates a package of assorted stickers entitled "Russia is Free." Join the Bolsheviks May First."

Inspector: I will enter as evidence in this case one of these circulars entitled "May Day of Revolution" and make same part of the record, marked "J 2". I will also introduce as evidence and make same part of the record of this case one each of stickers entitled "Join the Bolsheviks May First. International Labor Day" and Russia is Free; Now Free America; Demonstrate May 1"; both bearing the imprint of the United Communist Party and marked same "J 3".

Q. What are these circulars (referring to the package of 9 circulars entitled May Day of Revolution?

A. These were picked up on the door steps on Fairmount Avenue from 422 to 404 after being distributed by Stolisky.

Inspector: I will introduce as evidence and make same part of the record in this case one of 9 circulars entitled "May Day of Revolution" and marked same Exhibit "J 4".

Q. Where was Bilokumsky at the time you say you saw Stolisky putting these circulars J 4 on the door steps?

A. Right along side of him,—walking east on Fairmount Avenue.

Q. Were they walking close together?

A. Yes.

Q. Talking to each other?

A. I couldn't say that.

Q. But you didn't see Bilokumsky distribute any circulars?

A. I did not.

26 (By Inspector to counsel:)

Q. Do you wish to cross-examine this witness?

A. Yes.

(By Counsel to witness:) When did you first get to this case? I was detailed on April 26th to patrol Fairmount Avenue from 4th to 5th Street.

Q. When did you first see Bilokumsky?

A. I saw him about twenty minutes after twelve coming east on Fairmount Avenue from 5th Street.

Q. Between 5th and 4th?

A. Yes. They looked somewhat suspicious to me and I was on the west side of the street.

Q. Where were you standing at that time?

A. I was standing on the west side of Fairmount Avenue near 5th Street.

Q. Fairmount Avenue runs east and west?

A. Yes.

Q. What do you mean by the west side of Fairmount Avenue?

A. I mean the north side.

Q. You were standing on the north side of Fairmount Avenue—where?

A. Near 5th Street.

Q. And Bilokumsky was going east on Fairmount Avenue near 5th?
A. On the south side.
Q. Did you see him at the corner of 5th & Fairmount Avenue?
A. I did.
Q. Then you first saw him at the corner?
A. I saw them coming around 5th Street.
Q. They were coming up 5th Street?
A. They just turned the corner when I reached Fairmount Avenue near 5th.
27 Q. Where did they come from?
A. I don't know.
Q. You say they were turning the corner? They must have been coming north on 5th Street?
A. I don't know where they came from?
Q. Were they two together?
A. Yes.
Q. What were they doing?
A. They were walking east on Fairmount Avenue on the south side.
Q. Was anybody else with them?
A. Just those two.
Q. How many other people were around there?
A. A few other officers in civilians? There were.
Q. Were you in civilian clothes?
A. I was.
Q. Where were the other officers?
A. They were west on 5th on Fairmount Avenue.
Q. Was anybody on Fairmount Avenue between 4th & 5th besides you three?
A. That is all.
Q. How far did they walk east on Fairmount Avenue?
A. To 422. Then Stolisky, walking along the house line, began to distribute this literature.
Q. Did they arouse your suspicion?
A. Yes.
Q. Before that time?
A. Yes.
Q. How long before?
A. A few minutes.
Q. Were they suspicious as they turned the corner?
A. They were.
Q. Were they suspicious from the time you first saw them, is that right?
A. They were.
28 Q. Why were they?
A. Because they were close together and they were foreigners and they had stopped and looked up 5th Street and out Fairmount Avenue.
Q. How did you know they were foreigners?

A. I could tell by their appearance that they were foreigners.
Q. Describe their appearance to show that they were foreigners?
A. I mean by their face,—their looks.
Q. What about their face?
A. They had a Polish expression.
Q. Who had?
A. Both of them.
Q. Then how would you describe that expression?
A. I do not know how I could go about describing the expression of their face. They had the color of any other Polish man in the district around there.
Q. What color is that?
A. I couldn't call it any color.
Q. What is the peculiar color of the face which you call Polish?
A. I work amongst thousands of them and they all look alike.
Q. If they all look alike and you are so experienced, what would you say is the characteristic of a Polish face. How is it different from an Irish face?
A. That all depends on whether the Irish man drinks or not.
Q. Now, officer, I would like you to seriously describe what you would call a Polish face,—having had so much experience?
A. I don't know how to answer that question. If you put them out there, I will pick them out.
Q. Is that why you suspected them?
A. Yes.
Q. Because they were foreigners?
A. Yes.
29 Q. Where were you standing when they were passing east on Fairmount Avenue?
A. I was standing on the north side of Fairmount near 5th Street?
Q. Were you standing near the house line?
A. I was standing on the building line near the end of a drug store.
Q. Then you say one of them was distributing circulars?
A. When they got to 422 Fairmount Avenue.
Q. What makes you so sure of the number?
A. Because I looked up at the number when I got there.
Q. They distributed until where?
A. 404.
Q. What did they do after that?
A. They walked east on Fairmount Avenue crossing 4th. Then they were trailed by Officer Bender.
Q. When did you go to where you say the literature had been distributed?
A. I started after they went east on Fairmount Avenue on the north side. After they got about 50 or 60 feet ahead of me, I started walking east on the north side of Fairmount Avenue along the building line,—keeping in the dark. When they got to 422, Stolisky threw literature on the steps.
Q. The only man you saw distribute was Stolisky?

A. Yes.
Q. How long after he had distributed did you go there to see what he had distributed?
A. About one minute.
Q. Did you pick up any leaflets?
A. I did.
Q. Where are they?
(Witness refers to circular identified as J4.)
Q. You claim these are the circulars you picked up off the steps?
A. They are.
Q. Were they all picked up by you?
A. They were.
30 Q. Then you lost track of them?
A. I went east on Fairmount Avenue crossing 4th Street. Then I saw Officer Bender start to trail them.
Q. Then did you pursue them further?
A. I did not.
Q. You do not know what happened afterwards until what point?
A. Until they came west on Fairmount Avenue, being trailed by Officer Bender, Detectives Moriarty, Plateau and Emanuel.
Q. Where did they come from?
A. They came west on Fairmount Avenue. I was detailed on one block from 4th to 5th.
Q. Where did they first reappear on Fairmount Avenue?
A. On the South side on 4th Street coming west.
Q. Did you see them doing anything?
A. Not then; No.
Q. How long after that were they arrested?
A. About three minutes at 5th & Fairmount,—Southeast corner.
Q. By whom were they arrested?
A. Moriarty, Plateau, Bender, Emanuel and myself.
Q. But who actually placed them under arrest?
A. They were charged up with the five of us. The five of us went to the station house.
Q. But who placed them under arrest? Who told them they were under arrest?
A. We all did. Officers Moriarty and Plateau had one and Lieut. Emanuel and myself had the other;—Bender with them.
Q. Did you tell either defendant he was under arrest?
A. I did.
Q. To whom did you say it?
A. I told Bilokumsky.
Q. Did anybody else tell Bilokumsky he was under arrest?
A. No.
Q. Were you the first one to get to that corner?
A. We were all there about the same time.
31 Q. Where did you all dash from?
A. Officers Moriarty, Plateau, Lieut. Emanuel and Officer Bender were trailing them west on Fairmount Avenue. As they neared 5th, we all closed in on them and placed them under arrest on the southeast corner of 5th & Fairmount Avenue.

Q. Did you go with them to the station house?
A. I did.
Q. Who searched these men?
A. I searched Bilokumsky.
Q. Where?
A. In the roll room of the station house.
Q. Before he was slated?
A. After being slated.
Q. Before he was taken to the cell room?
A. Yes.
Q. Now state again what you found?
A. I found on Bilokumsky between his stocking or his sock and his skin these stickers? (Officer refers to Exhibit J 3.)
Q. Before you examined him, he wore socks over these stickers?
A. Yes.
Q. He had shoes on?
A. Yes.
Q. Did he have lace shoes?
A. Yes.
Q. Half shoes or full shoes?
A. Full shoes.
Q. Reaching over his ankles?
A. Yes.
Q. These shoes were laced?
A. They were.
Q. And the laces were tied?
A. Just as laces would ordinarily be?
A. Yes.
Q. What did you do with the stickers after you found them?
A. Laid them on top of the desk in the roll room until I was done searching him.
32 Q. Then what?
A. Then I held them for evidence.
Q. Where did you hold them?
A. In this package (witness produces a 1 lb. grocery paper bag).
Q. And you kept all the other circulars in the same bag?
A. I did.
Q. Is that the only thing you kept in that bag?
A. That is all.
Q. Are you sure?
A. Yes.
Q. And you had these stickers in that bag and the circulars you say you picked off the steps in that same bag?
A. Yes.
Q. What else did you keep in that bag?
A. Nothing else.
Q. Did you have any other circulars in that bag?
A. The circulars I found on Bilokumsky and the stickers and the 9 circulars I picked up off the door steps.
Q. Now, you say you found some circulars on Bilokumsky when you searched him?

A. I did.
Q. Where are they?
A. (Officer refers to Exhibit J 2).
Q. Where did you find these?
A. I found them between his coat and vest at the arm pit.
Q. Under his shirt or over his shirt?
A. Between his coat and vest.
Q. Did he have a shirt on?
A. He did.
Q. Long sleeves or short sleeves?
A. Long sleeves.
—. Did he wear anything under his shirt?
A. An undershirt.
Q. Where did you find these circulars,—inside his top shirt or outside his top shirt?
A. Between his coat and vest.
33 Q. Can you say whether that is inside his top shirt or outside his top shirt?
A. Outside.
Q. How were these circulars kept there in place?
A. I don't know. After asking him to take off his coat, as he started to pull his coat off, I saw the circulars.
Q. Where did you see the circulars?
A. Sticking right in the arm pit. Then they dropped to the floor.
Q. Can you state now which circulars were taken from the step and which from his arm pit?
A. I can.
Q. Which are they?
A. The ones folded in three parts were taken from the steps. The ones folded in two parts were taken from his arm pit.
Q. Where did you get this grocery bag?
A. I found it lying on the desk in the station house.
Q. When did you find it?
A. Looking for a piece of paper to wrap up the evidence, I spied the bag and put them into the bag.
Q. How many days after the arrest was that?
A. The same morning.
Q. How long after you searched this man?
A. 15 or 20 minutes.
Q. Where did you get this note paper?
A. That note paper belongs with some of this (refers to stickers).
Q. Where did you get that?
A. It was around the stickers at the time.
Q. Where did you keep this grocery bag after you found it and put the literature inside?
A. I kept it in my locker room in the station house?
Q. How long?
A. From the time of the arrest. I kept them in there that morning. Then we took them down to Central Station and I took them back to my locker in the station house and kept them there

until the first day I was summoned into the Commonwealth
34 Court.

Q. What happened there?

A. The case was not called.

Q. Then you brought them out twice for a hearing?

A. I did.

Q. First for the magistrate's hearing and then for the Quarter Sessions Court?

A. Yes.

Q. How long after the arrest did you bring them before the magistrate?

A. 9 or 10 hours.

Q. Did you take these circulars before the magistrate?

A. I did.

Q. Did you produce them against this man?

A. I did.

Q. Did you testify against this man?

A. I testified against both of them at the magistrate's court.

Q. Did the magistrate examine these circulars?

A. No; not the circulars I had.

Q. Which circulars did the magistrate examine?

A. There was more than one arrest that night. The District Attorney saw my circulars.

Q. Did you give him the whole bag?

A. I had them lying on the top of the bible on the witness stand. There he asked me for one of each of the stickers and circulars. After talking to the magistrate or the attorney, he returned them to me.

Q. How many did he have in his hand?

A. Of my evidence?

(Counsel:) Yes.

(Witness:) One of each stickers and one "May Day of Revolution" circular.

Q. Where was the rest of this literature?

A. Lying on the bible on the witness stand.

Q. And after the hearing, what did you do?

A. I went back to the station house and from there, home.

35 Q. Who took the literature back?

A. I took my evidence back.

Q. In the same bag?

A. In the same bag.

Q. Where did you put it?

A. Put it in my locker in the station house.

Q. Where did you have it before you took it to the magistrate?

A. I had it in my locker in the station house.

Q. Did you sleep in between the arrest and the hearing?

A. I did not.

Q. When were you off duty that night?

A. I was on from 4 o'clock that afternoon until 6:30 the next morning.

Q. Why didn't you keep them in your pocket until the hearing?
A. I don't know exactly, because I carry a gun and badge in one pocket and everything is a weight.
Q. Who else shares the locker with you?
A. No one.
Q. Is there a key to that locker?
A. There is.
Q. Who has keys besides you?
A. No one.
Q. Is there anybody in the station house who has a key to that locker besides you?
A. Not to the best of my knowledge. I have not given any to anyone.
Q. Has not the sergeant a key to all lockers?
A. No.
Q. Is there no officer or official at the station house entrusted with a key to all lockers?
A. No sir.
Q. Did you make any other arrests that night besides this?
A. I did not.
Q. How long did this bag remain in that locker before you next took it out?
A. Until I was summoned to the Quarter Sessions Court.
36 Q. Did you have any identification mark on any of these circulars at any time?
A. I only kept them in the bag with my name and number on it.
Q. When did you put that on?
A. That same morning.
Q. What same morning?
A. The same morning I helped to place the men under arrest.
Q. Do you know where this bag came from?
A. I do not.
Q. Do you know who put it there?
A. I do not.
Q. How long after the Magistrate's hearing was the hearing before the Court of Quarter Sessions?
A. I could not state the exact date.
Q. To the best of your recollection?
A. May be a month. May be six weeks.
Q. Did you take the literature out there to show to anyone,—at the court?
A. I did not.
Q. Was that the second time you had taken out the literature from the locker?
A. That was the second time.
Q. Are you sure you didn't take it out in between?
A. I did not.
Q. Are you positive of that?
A. Positive.

Q. When was the next time you took the literature out?
A. The next time I took it out was to go to the Quarter Sessions Court.
Q. What for?
A. I was summoned there for the trial of these men.
37 Q. How long was that after the first time you were summoned?
A. Two or three days.
Q. What happened then?
A. I was back in Quarter Sessions again.
Q. What happened there?
A. The case was referred to the United States Court.
Q. It was not tried?
A. It was not tried.
Q. What did you do with the circulars then?
A. I took them home.
Q. Where did you keep them?
A. Kept the- in the trunk.
Q. Whose trunk?
A. My trunk.
Q. Do you live with anybody else?
A. I live with my wife and baby.
Q. Is that trunk locked?
A. Yes, except when we go in there for something.
Q. What was the reason for taking it home?
A. For the reason that at times I would be summoned to court and when I would be off duty, I would have to make a trip to the station house to get same.
Q. Are you positive you only took this literature out of your locker three times?
A. Three times.
Q. Once for the magistrate's hearing?
A. Yes.
Q. Twice for the court of Quarter Sessions?
A. Right.
Q. In Room 453?
A. Yes.
38 Q. For the trial of these men?
A. Yes.
Q. And you never had this literature at the City Hall for any other purpose?
A. The magistrate's hearing and three times summoned to court.
Q. You have explained two summons to court, each for Room 453. Is that right?
A. I explained three summons to court.
Q. What are they?
A. I explained I took them to court on one day; again two days later and on the third time and to the best of my knowledge, the case was referred to the U. S. court.
Q. Now, to get this straightened, I will ask you again—The first time you went to the City Hall with this literature, what did you go for?

A. The magistrate's hearing.
Q. The second time,—what for?
A. The second time I was summoned to Room 453, Quarter Sessions Court.
Q. What for?
A. To testify for the trial of these defendants.
Q. Did the trial come off?
A. It did not.
Q. Was any use made of this literature at that time?
A. There was not.
Q. Did anybody examine this literature at that time?
A. They did not.
Q. The next time you went to City Hall,—when was that?
A. Two or three days later.
Q. Same place?
A. Yes.
Q. Same reason?
A. Yes.
Q. Did the trial come off?
A. No.
39 Q. Was any use made of this literature by anybody?
A. No.
Q. Did anybody examine this literature?
A. No.
Q. The next time you went to City Hall with this literature was when?
A. I was summoned again.
Q. Same court?
A. Same court.
Q. Same room?
A. Same room.
Q. Same purpose?
A. Same purpose.
Q. Did the trial come off?
A. It did not.
Q. Did anybody examine this literature?
A. They did not.
Q. Did anybody make any use of this literature?
A. Did not.
Q. Did you ever go again to City Hall with this literature?
A. No.
Q. Then according to your testimony, with the exception of what transpired at the magistrate's hearing, nobody has to this day ever examined this literature at the City Hall and nobody has made any use of this literature at the City Hall. Is that right?
A. They have not.
Q. Then what I ask you is correct?
A. Yes.
Q. Was the literature ever taken out of that trunk at your house?
A. Not since the last time I was at court.

40 Q. Did you ever take it out of the trunk to take it to court?
A. I did.
Q. When?
A. One day.
Q. Was that the last time you took it to court at the City Hall?
A. Yes.
Q. The Quarter Sessions Court?
A. Yes.
Q. The trial was again postponed?
A. Yes.
Q. No use made of the literature at all?
A. No.
Q. Was this literature ever examined by anyone at any time and at any place excepting what you have stated took place at the magistrate's hearing?
A. When I searched this man and found his stuff, I said: "I have some Bolsheviki papers on this man."
Q. To whom did you say that?
A. To officer Bender, Detectives Plateau and Moriarity and Lieut. Emanuel.
Q. Did they have literature?
A. Moriarity and Plateau got literature from Stolisky.
Q. What did they do with their literature?
A. I don't know.
Q. Outside of that occasion, did anybody else ever examine this literature?
A. They did not.
Q. Did you ever show this literature at any time to anybody else?
A. No.
Q. Nobody else ever saw it?
A. No.
Q. You are positive of all that?
A. I am.
41 Q. When did you take this literature out of the trunk the second time?
A. I took it out of the trunk the second time when I was summoned here last Monday.
Q. Did you show it here to anybody?
A. I did not.
Q. Took it right back again?
A. Yes.
Q. And all this time since you first had possession of all the literature you have produced here, no part of this literature has ever been out of your possession. Is that true?
A. Only in my locker and in my trunk.
Q. And could anybody get the literature out of your locker or trunk without your consent or any part of it?
A. No.
Q. Did you authorize anybody to take any part of this literature out of your trunk?
A. No.
Q. At any time?

A. I did not.
Q. Are you positive of that?
A. I am.
Q. Did you ever give testimony before anybody in reference to this case before this hearing excluding the testimony you gave before the magistrate?
A. I have.
Q. Before whom?
A. I don't know who I gave it to, but I gave it to some one in the Detective Bureau.
Q. For what purpose?
A. I don't know.
Q. Do you remember what you were asked?
A. They asked me what I knew about him. I told them I placed them under arrest and found the stuff on Bilokumsky.

42 Q. Did you identify at that time any circulars as having been found in the possession of Bilokumsky by you?

A. I did not.
Q. Did you speak about the circulars?
A. I did.
Q. Were you asked to say what you found on this man?
A. No, I was not.
Q. Did anybody ask you to say what kind of circulars you found on this man?
A. No; they did not.
Q. Were any circulars shown to you for you to say whether these were the circulars or similar circulars to those you found on Bilokumsky?
A. I told them I had circulars like those lying on the desk that I had found on Bilokumsky.
Q. What circulars were lying on the desk?
A. "May Day of Revolution".
Q. Whose desk?
A. I believe Captain Tate.
Q. All you remember is the heading of these circulars?
A. Yes.
Q. At that time, did anybody ask you to produce the actual goods you found on this man?
A. No.
Q. How did you know that the circulars lying on the Captain's desk were like those found on Bilokumsky?
A. They had the same heading and looked alike.
Q. That is all you know? Now about the rest of the contents of the circular shown to you lying on the Captain's desk?
A. I did not read it.
Q. Were you sworn at that time?
A. I was.
Q. By whom?
A. I do not know.

43 Q. You were asked to say whether the circulars you found on Bilokumsky were the same as the one lying on the Captain's desk. Is that right?

A. I was not. I stated that myself.
Q. Under oath?
A. Yes.
Q. That is you testified that the circulars you found on Bilokumsky were the same as the one lying on the Captain's desk without reading the one on the Captain's desk?
A. By seeing the heading of it. I did not read it all.
Q. That is all you read,—the heading?
A. Yes.
Q. On the Captain's desk?
A. Yes.
Q. How many kinds of circulars were lying on the Captain's desk?
A. Only that one kind.
Q. How many of them?
A. I did not count them.
Q. Were you asked to say anything about the circular you saw Stolisky distribute and that you had picked up?
A. I testified that I picked circulars from the doors—422 to 404 Fairmount Avenue.
Q. Did you identify any circulars as being the ones Stolisky was distributing?
A. I did.
Q. Were you asked to identify any circulars there as being like the ones Stolisky was distributing?
A. I stated in my testimony that the circulars I had were the same as that on the desk. I had stickers also.
Q. What I want to know is this: Did you say at that hearing that any of the circulars on the Captain's desk were like the circulars you picked off the street which Stoolsky had distributed?
A. I said those were like them.
44 Q. And when you spoke about the Stolisky circulars,—those he had distributed,—and you identified that, did you refer to the same circular on the Captain's desk as when you spoke about the circulars taken from Bilokumsky?
A. I was testifying against both of them at that time.
Q. Officer, you did not answer my question: I want to know if it is not a fact that you were asked something about the circulars you took from the street which you had seen S-olisky distribute and also something about the circulars you took from Bilokumsky. Is that right?
A. I do not recall that question.
Q. Now, officer, is it not a fact that at that sworn interview at the Detective Bureau, at Philadelphia, April 30th 1921, you were asked something about the circulars you picked off the street, which you said you saw Stolisky distribute?
A. I do not recall it.
Q. Do you recall whether you were asked something about the circulars you took from Bilokumsky?
A. I don't recall that either. I just stated that the circulars I had were like that on the desk.
Q. Well, didn't you make any distinction between the circulars you

had coming from Stolisky and those you had coming from Bilokumsky?

A. I don't believe I did.

Q. Do you remember whether you were asked whether the circulars you had were like those on the desk?

A. I was not asked that.

Q. Well, you said something about comparing the circulars you had with the ones on the Captain's desk?

A. I stated that. I don't recall being asked any questions at that hearing.

Q. Don't you remember now comparing the heading of the circular on the Captain's desk with your circular?

A. I read one of the circulars that I had at the time of the arrest shortly afterwards and at the hearing at the Detective Bureau, I saw the heading was the same.

Q. Did you ever refer to more than one circular?

A. I believe I testified that I found nine circulars on door steps from 422 Fairmount Avenue to 404 and that I found circulars on Bilokumsky between his vest and coat—in the arm pit—and stickers.

45 Q. Now, you, at no time, saw Bilokumsky distribute anything?

A. No, he did not.

Q. I show you Exhibit marked J2 and ask if you can swear that you ever had this identical circular before you heretofore?

A. I don't understand what you mean.

Q. I ask you if you can testify that you ever had, in your possession, this identical circular marked J 2 before?

A. I have had them in my possession since the time of the arrest.

Q. Can you swear that this circular marked J 2 is not one of the circulars you picked off the street?

A. I can.

Q. How can you do so?

A. By only being folded in two parts. The ones I picked off the door step were folded in three parts.

Q. Now, I will show you this exhibit marked J 2 and ask you if it is not a fact that the circular has three folds, one fold approximately between the 5th and 6th line-, the second fold approximately through the middle of the paper and the third fold approximately between the third last and second last paragraphs. Each of these three folds run- approximately parallel with the type. Is that not true?

A. What you state there is right, but they were only folded in two parts when I received them. This one does not fold in the same manner as the ones folded in three parts.

Q. I now show you a circular also entitled "May Day of Revolution, marked for identification J-2*a*. Now, this circular (J-2*a*) was taken from the pile you say were folded in three and had been distributed by Stolisky. Is that right?

A. Yes; that is right.

Q. I ask you to state to me the differences in the folds between J 2 and J 2*a*.

A. J 2*a* has two distinct folds in it and J 2 has only one
46 distinct fold. Taking it up and dropping it on the desk, it will fold into those creases.

Q. Well, is it not a fact that both J 2 and J 2*a* each have three folds in approximately the same places and approximately the same direction.

A. Yes, pretty near together.

Q. Now officer, the only way you can distinguish these two circulars is by the way you took them out of your paper bag,—folded in two or three.—Is that right?

A. I had them all in my paper bag and I know that the ones folded in three were the ones I took off the door step and the ones folded in two are the ones I took from Bilokumsky.

(By Inspector to alien:) Are you able to furnish bond in the sum of $1,000?

A. Yes.

(By Inspector to counsel:) Do you intend to have a brief of argument accompanying this record to the Department?

A. Yes. I can have one in one week after receipt of a copy of the transcript.

I hereby certify that the above is a correct transcription of testimony taken by me in the above case.

M. E. SMITH,
Stenographer.

47 May Day of Revolution.

May Day of revolution is here;
May Day when the workers of the world think of liberty;
When they form their ranks as a challenge to the masters;
When they come out in their millions and demonstrate the solidarity of the workers;
This year the American workers must all demonstrate.
They have good reason. The bosses have challenged the millions of workers in the country. They have organized to rush the workers; they want to exploit them more. In their greed they intend to grind out more profit from their bones. They want to know who shall be masters in America.
Then let us show them who will be the masters;
Let us tell them that THE SYSTEM MUST BE CHANGED;
Let us tell them we will change it by REVOLUTION;
There is only one way there is no other.
In Europe the workers are carrying on their fight;
With gun in hand they are fighting their government determined to overthrow them and set up workers' governments that shall represent ONLY the workers; in Italy and Germany, the workers face the guns of the government ready to die to determine their freedom from the brutal system.
In England, France and Spain they are preparing for the day when the clash with the government must come. In India, Egypt

in the near and far east the workers and the oppressed people are organizing their ranks to drive out the imperialist robbers and cut throats who hold them enslaved. They are learning to USE FORCE AGAINST FORCE.

There is no other way.

Only in Soviet Russia the workers may celebrate May Day as FREE MEN. Only in Soviet Russia there is no exploitation; in Soviet Russia the workers rule; attacked by the whole capitalist world the workers of Soviet Russia have stood fast and defended the revolution. The revolution is spreading across the globe. It calls to us.

LET US PREPARE!

TOO long we have stood the misery the bosses have forces on us; We have not forgotten the war which KILLED AND CRIPPLED FOR LIFE MILLIONS OF WORKERS AND FILLED THE BOSSES' POCKETS WITH GOLD. We have not for-
48 gotten the war and all its fake promises. We have not forgotten and we will not forget. The bosses are preparing a new war. Millions of men are unemployed and the bosses are afraid of them.

And well they may be afraid.

We American workers will no more stand the tyranny of the bosses and of their government. We have had enough.

The United States Government stands for the bosses against the workers; it uses the law making bodies, the courts and its troops against the workers.

THEN WE MUST DESTROY THE UNITED STATES GOVERNMENT.

We must overthrow it and put *it* in its place a workers' government. We must uphold the workers' government with a strong army to crush the bosses and all who support them.

We must prepare for the revolution, there is no other way.

May Day of the revolution is here.

Let us join the ranks of the fighting American workers.

Let us proclaim our solidarity with the revolutionary workers of Germany and Italy.

Let us proclaim our solidarity with the workers of the entire world.

LET US PREPARE FOR THE REVOLUTION UNITED COMMUNIST PARTY OF AMERICA.

49 EXHIBIT J-2.

Meyamensing Prison,

Philadelphia, Pa.

April 29, 1921.

n duly sworn, testifies as follows:

.rey Dorofuychuk, Interperter.

Q. What is your name.

A. Michael Bilokumsky.

Q. What is your age, and where were you born?
A. 27 years old; born Nov. 30, 1894.
Q. Where were you born?
A. Village of Andrievka, town of Ampol, Province of Podolskaya, Russia.
Q. Where do you live?
A. 617 Jackson Street, Philadelphia, Pa.
Q. What kind of work do you do?
A. Caster in brass foundry.
Q. Are you married?
A. No, sir.
Q. What is your race and nationality?
A. Russia; race Russian.
Q. How long have you been in the United States?
A. 8½ years.
Q. At what port did you arrive; date and ship?
A. Philadelphia; S. S. "Merian", Nov. 10, 1912.
Q. Have you been in the United States continuously since that time?
A. Yes sir.
Q. When were you arrested and where?
A. Fifth below Fairmouth Avenue, last Monday April 25th.
Q. Where were you arrested that time?
A. Was working in Fairmouth Ave. and they arrested me in the restaurant.
Q. What were you doing that occasioned your arrest?
A. I was working; I did not do anything, and they arrested me.
Q. Were you ever arrested before; were you arrested in any Communist raid?
A. Jan. 2, 1919, at No. 259 6th St. Phila.
50 Q. Do you belong to any organization?
A. I belonged before to an organization at 414 Green Street.
Q. What was the name of it?
A. Russian Insurance Company.
Q. Do you belong to the Communist Party?
A. No.
Q. Do you believe in the overthrow by force or violence of the government of the United States or of all forms of law?
A. No sir.
Q. Did you ever distribute any literature advocating or teaching the overthrow by force or violence of the government of the United States or of all forms of law?
A. No sir.
Q. Did you publish, or cause to be published, any such literature?
A. No.
Q. Did you ever have any such literature in your possession?
A. No.
Q. Are you an anarchist, or do you believe in anarchy?
A. No sir.
Q. Do you believe in unlawful destruction, injury or damages to property?

A. No sir.
Q. Did you ever take out naturalization papers?
A. Never took out first or full papers.

Certified correct copy of Stenographic notes of hearing taken by me.

CHAS. B. REISS,
Immigrant Inspector
(Examining Inspector and Stenographer).

51 *Landing Certificate.*

No. 4088/76.

Commissioner of Immigration,
Philadelphia Immigration Station,
Gloucester City, New Jersey.

Certificate of Admission of Alien.

U. S. Department of Labor,
Immigration Service.

June 17, 1921.

I hereby certify that the following is a correct record and statement of facts relative to the admission to the United States of the alien named below:

(1) S. S. Merion; Line, American.

(2) Date arrival, Nov. 5, 1912; Manifest No. S-21; Class 3rd.

(3) Port at which admitted, Phila. Pa.

(4) Name, Michal Bialokon; age 18, sex M.

(5) Married, No; occupation, F. laborer; able to read and write.

(6) Native of Russia; race, Russia.

(7) Last permanent residence, Andrejowka.

(8) Destination, Phila. Pa.

(9) By whom passage paid, Self; money brought, $24.

(10) Whether in U. S. before No; when ——; where ——.

(11) To whom going, Jam Garber, 3274 Salmon St. Phila.; condition of health, Good.

(12) Height, 5′ 9″; complexion fair; color of hair, Br.

(13) Color of eyes, Grey; identification marks, None.

(14) Place of Birth, Andrejowka, Russia; examined by Acting Inspector F. Juskewicz.

(15) How admitted, Primary; Accompanied by No one.

(16) Remarks: ——.

(Signature:) ——— ———,
(Official Title:) *Commissioner.*

This form is insufficient as a basis for a petition for naturalization.

52 (EXHIBIT A 3.)

Copy.

Workers Mobilize.

International Labor Day.

United Communist Party.

53 File No. 4088/15.

Departmental Warrant of Arrest No. 55009/76, May 14, 1921.

Objections by Counsel in Case of Michael Bilokumsky, alias Bialokowski.

I object introducing as evidence Exhibits J 2 and J 3, or either of them.
I object to putting in evidence Exhibit J 4.

54 *Warrant—Arrest of Alien.*

U. S. of America,

Department of Labor,

Washington.

No. 55009/76.

To J. L. Hughes, Commissioner of Immigration, Phila. Immigration Station, Gloucester City, N. J., or to any immigrant inspector in the service of U. S.:

Whereas from evidence submitted to me it appears that the alien Michael Bilokumsky who landed at port of Phila. Pa. ex S. S. "Merion" on the 10th day of Nov. 1912 has been found in the United States in violation of Act of Oct. 16, 1918 as amended by the Act of June 5, 1920 for the following among other reasons: That he writes, publishes, or causes to be written or published, or knowingly circulates, distributes, prints or displays, or knowingly causes to be

circulated, distributed, printed, published or displayed, or knowingly had in his possession for the purpose of circulation, distribution, publication or display, written or printed matter, advising, advocating or teaching the overthrow by force or violence of the government of United States or of all forms of law.

I, Theodore G Risley, acting Secretary of Labor, by virtue of power and authority vested in me by laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention hereunder, if necessary, are authorized, payable from appropriation "Enforcement of laws against alien anarchists 1921." Pending further proceedings the alien may be released from custody upon furnishing satisfactory bond in the sum of $1,000.

For so doing, this shall be sufficient warrant.

Witness my hand and seal this 19th day of May, 1921.

THEODORE RISLEY,
Acting Secretary of Labor.

[Endorsed:] U. S. District Court. Filed April 12/22. U. S. District Court.

55 U. S. Department of Labor,
Bureau of Immigration,
Washington.

No. 55009/76.

August 8, 1922.

Commissioner of Immigration,
Philadelphia, Pa.

SIR:

The Bureau acknowledges the receipt of your letter of June 27th, No. 4088/15, transmitting record of hearing accorded the alien Michael Bilokumsky, alias Bialokowski, who landed at the port of Philadelphia, Pa., ex S. S. "Marion," on or about November 10, 1912.

After a careful examination of the evidence submitted in this case, the Department is of opinion that the alien is in the United States in violation of law. You are therefore directed to cause him to be taken into custody and conveyed to New York, N. Y., for deportation, the expenses incident to such conveyance, including the employment of an attendant to assist in delivery, if necessary, at a nominal compensation of $1.00 and expenses both ways, being authorization, payable from the appropriation "Expenses of Regulating Immigration, 1922."

Conveyance of the alien to New York, N. Y., should be deferred until such time as the necessary arrangements have been made by the Ellis Island office for his return and sailing dates furnished you by

that office. Execution of the warrant will serve to cancel the bond in the case.

Respectfully,
(Signed) ALFRED HAMPIN,
Assistant Commissioner General.

Approved:
(Signed) THEODORE G. RISLEY,
Acting Secretary.

Inclose W. D. No. J. G. W. 3742.

56 U. S. Department of Labor,

Immigration Service.

No. 4088.

July 11, 1921.

Commissioner of Immigration,
Philadelphia Immigration Station,
Gloucester, N. J.:

I have the honor to submit a Report in General, re Department Warrants of Arrest:

55009/76. Michael Bilokumsky.
55009/77. Thomas Klein.
55009/78. Peter Klein.
55009/79. Antonio Baldassarre.
55009/81. Nick Anton.
55009/85. Michael Dauerbach.
55009/88. Giuseppe Baldassarre.
55009/89. Demjan Tarasuck.
55009/90. Jacob Weber.
55009/91. John Stolisky.
55009/92. Nicholas Snyder.
55009/93. Haratoun Pilbesian.
55009/94. Samuel Rubin.
55009/95. Vahan Kasparian.
55009/96. Samuel Jacobs.
55009/97. Andreas Pagor.
55009/98. Reinhold Kinperpof.
55009/100. Josef Novak.
55009/101. Peter Herbertuk.
55009/103. Jacob Miller.

These twenty Warrants of arrest were issued on information developed in arrests made by the Phhiladelphia police authorities in anticipation of a general demonstration or uprising to be made by Communists on May 1, 1921, characterized by them as "Red Labor Day." About forty persons were apprehended in either distributing, or having in their possession for distribution, propaganda of the United Communist Party of America, urging armed revolution.

A large number of those arrested were found to be aliens. With a view to ridding this country of such undesirables, the Mayor and his Cabinet, and the local Division of Investigations, Department of Justice, cooperated with this Service. The cooperation has been full and complete. The arrests were made on April 25-26, and while in the custody of the City authorities the aliens were interviewed under oath to determine their status, resulting in the request for about thirty Departmental Warrants of Arrest. Of this number, the above enumerated were issued. Hearings thereunder were accorded the aliens, in which all but two were represented by I. Lasker

Greenberg, Esq., as counsel, presumably employed by the Committee of Defense of the United Communist Party of America. It is also a significant fact that the bonds called for in the warrants were provided by that Committee. Another outstanding fact to be considered in reviewing these cases is that the entire proceedings of this Committee have been in line with the tactics of the United Communist Party of America, published in the in-tial issue of the party's official organ, "The Communist," a copy of which is in the files of the Bureau. In reviewing these cases, it should also be
57 noted that those arrested represented particular groups of nationals, and that as a rule they operated at points distant from their places of residence and location of their groups, working in pairs and in one instance in quartette. Each case, therefore, correlates with the others to some extent, and in reviewing them this might be kept in mind.

It will be noted, also that every legal right and privilege was accorded counsel and clients in these hearings, so as to avoid affording cause for application for writ of habeas corpus. As it was counsel's purpose to block every effort of mine to prove the charges cited in the warrants of arrest, it was found necessary to establish proof by the introduction of sworn statements made by the alien, and the testimony of the police officers, which in most instances was clear and positive, notwithstanding the extraordinary efforts of counsel for alien to create doubt in his cross-examination, which in some instances were needlessly long drawn out and burdensome. Counsel has been furnished with copies of transcripts of testimony in all the cases heard, and has stated that he will have briefs of argument accompany these records, in which argument may appear against the admission of these statements as evidence without the alien having been advised of right to counsel—a Constitutional right. I believe there is a decision by the Supreme Court to the effect that one who seeks to overthrow the Constitution cannot invoke its protection.

With the exception of the cases in which cancellation of the warrant of arrest is recommended for lack of evidence, it is my opinion that all will withstand the test of writ proceedings, some of which may possibly be put thereto.

There has been delay in the execution and transmission of these warrants. This is mainly due to the fact that one attorney handled all but two of the cases, and the difficulty in holding witnesses, some of whom were on vacation, frequently necessitated postponement of the hearings as scheduled.

Of the twenty cases, two of the aliens have not yet been apprehended by this office and the other is in process of hearing, awaiting return from vacation of the witness. These will be submitted as promptly as possible.

A. G. BENKHART,
Immigrant Inspector.

58 U. S. Department of Labor,
Immigration Service.

June 27, 1921.

Commissioner of Immigration,
Philadelphia Immigration Station,
Gloucester City, N. J.:

Complying with instructions, I made service of Departmental warrant of arrest No. 55009/76, dated May 14th, 1921, issued in the case of one Michael Bilokumsky alias Bialokowski, by taking him in custody and according him a hearing thereunder. Attached hereto is a transcript of testimony taken in the hearing, together with certain exhibits made a part of the record of the case and appropriately marked. In the hearing alien was represented by attorney I. Lasker Greenberg, who instructed his client to remain mute. In order to prove the charges cited in the warrant, it was necessary to introduce as evidence alien's sworn statement taken at the time his status was investigated, which shows that the subject of the warrant is an alien, a native and citizen of Russia, who arrived at this port on the S. S. "Merion" Nov. 10, 1912. The oral testimony taken and the exhibits in the case fully sustained the charges cited in the warrant of arrest, in that it is shown that he "knowingly had in his possession for the purpose of distribution, circulation, publication, or display, written or printed matter advocating or teaching the overthrow by force or violence of the Government of the United States, or of all forms of law." The printed matter in question being propaganda of the United Communist Party of America, an organization which advises, teaches and advocates the overthrow by force or violence of the Government of the United States, alien is therefore in the United States in violation of the act of February 16, 1918, as amended by the act of June 5, 1920, and I recommend his deportation in conformity with law.

This case should be reviewed in connection with the case of John Stolicky, Departmental file No. 55009/91, transmitted concurrently, with whom he was apprehended.

Pending further proceedings, alien is released on bond.

A. G. BENKHART,
Immigrant Inspector.

59 Office Copy.

Order to Show Cause.

United States District Court, Southern District of New York.

M./7/81.

UNITED STATES OF AMERICA ex Rel. MICHAEL BILOKUMSKY, Relator,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York, Respondent.

On the annexed amended traverse or reply to the return herein verified April 14, 1922 and the annexed affidavit of Walter Nelles, verified April 14, 1922 and on motion of Hale, Nelles & Shorr, attorneys for the relator, it is

Ordered that the respondent show cause before the Honorable Augustus N. Hand, United States District Judge, upon the 15 day of April, 1922, at 12 o'clock noon, or as soon thereafter as counsel can be heard

(1) Why the relator should not be permitted to file herein the annexed amended traverse or reply;

(2) Why the respondent should not be required to file an amended supplemental or additional return stating which allegations of said amended traverse or reply are admitted by the respondent and which, if any, are controverted;

(3) Why the relator should not be granted a rehearing upon the issues raised by said amended traverse or reply with opportunity to adduce evidence in support of such allegations of fact therein as may not be admitted; and

(4) Why the relator should not have such other and further relief as may be just.

60 And let service of this order to show cause and the papers upon which it was granted upon the United States Attorney for the Southern District of New York on or before 10 o'clock A. M. on April 15, 1922, be sufficient.

Dated, New York, April 14, 1922.

AUGUSTUS N. HAND,
United States District Judge.

61 *Amended Traverse.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA ex Rel. MICHAEL BILOKUMSKY, Relator,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York, Respondent.

The relator above-named for his amended traverse and reply to the return herein alleges upon information and belief:

First. On April 29th 1921, and theretofore and continuously since, the rules of the United States Department of Labor with respect to deportation proceedings contained the following provisions:

Rule 22, Subdivision 5 (*b*).—At the beginning of the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued, and shall be apprised that he may be represented by counsel. The alien shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the conduct of the hearing, and to offer evidence to meet any evidence presented or adduced by the Government. Objections and exceptions of counsel shall not be entered on the record, but may be presented by him in an accompanying brief.

The accompanying brief filed by the relator's counsel, Mr. I. Lasker Greenberg, with the record of the relator's hearing on file in the Department of Labor is in part as follows:

"*Brief Re Michael Bilokumsky, Warrant No.* 55009/76.

"To the Commissioner General of Immigration,
"Washington, D. C.

"SIR:

* * * "The evidence of the alienage of the defendant is derived entirely from a statement purporting to come from the defendant and given by him to an immigrant inspector. What was
62 actually introduced in evidence is a copy of that sworn testimony without any oral evidence identifying the defendant as the affiant of that statement or other matter showing the correctness of the statement. That statement was objected to for these reasons:

"If the statement is to be deemed as part of the hearing, it is objectionable likewise on the ground that it is in violation of Rule

22, subd. 5*b*, providing as follows:" (here follows quotation of the first three sentences of Rule 22, subd. 5*b* hereinabove quoted).

"It is clear that the alien was not advised of his rights to have counsel before this testimony was taken, and the warrant was not read to him, and he was not advised of his other legal rights.

"There is, therefore, no legal evidence that the defendant is an unnaturalized alien.

"The shipping record or landing certificate that may be appended to or exhibited in this record is likewise objectionable, because there is no evidence establishing the identity of the person mentioned in the landing certificate with that of the defendant.

"All exhibits offered in this case are objected to on the ground that they are improperly identified.

"It is, therefore, requested that the warrant in this case be cancelled.

"Respectfully submitted,

"I. LASKER GREENBERG,
"Attorney for Michael Bilokumsky."

Second. At the time when the writ of habeas corpus herein was applied for and issued upwards of seven months had elapsed since the final order and warrant of the Secretary of Labor directing the relator's deportation to Russia, and the relator was imprisoned and detained in the custody of the respondent. At all times herein mentioned ingress or admission to Russia has been and it now is, under the control and subject to the permission of an organization or association known as the "Russian Socialist Federated Soviet Republic." The Government of the United States has not recognized said Soviet Republic, and has expressed an intention not to do so. Said Soviet Republic declines to permit the entry into Russia of persons ordered deported to Russia from the United States.
63 It is not, and there is not likelihood that it will be, within the power of the respondent to comply with the commands of the warrant for the relator's deportation and effect the relator's deportation to Russia within a reasonable time. The continued detention of the relator under said warrant amounts to his indefinite imprisonment under the guise of awaiting an opportunity for deportation, and deprives him of life, liberty and property without due process of law contrary to Article 5 of Amendments to the Constitution of the United States and violates Article 13 of Amendments to the Constitution of the United States.

Wherefore the relator prays that he may have his liberty.

MICHAEL BILOKUMSKY,
Relator,

By WALTER NELLES,
His Attorney.

HALE, NELLES AND SHORR,
Attorneys for Relator.

80 East 11th Street, New York.

6—518

UNITED STATES OF AMERICA,
State, County, and Southern
District of New York, ss:

Walter Nelles, being duly sworn, says:

I am one of the attorneys for the relator herein, I have read the foregoing document and know the contents thereof and the same is true of my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true. The reason this is verified by me instead of by the relator is that it could not be completed until after three o'clock on April 14th, 1922, and an order dismissing the writ has been noticed for settlement for ten o'clock on April 15th. Access to prisoners on Ellis Island is not permitted after three o'clock.

WALTER NELLES.

Subscribed and sworn to before me this 14th day of April, 1922.

CAROL WEISS KING,
Notary Public.

New York Co. Clerk's No. 310.
New York Co. Register's No. 4203.
Commission expires March 30, 1924.

64 United States District Court, Southern District of New York.

UNITED STATES OF AMERICA ex Rel. MICHAEL BILOKUMSKY, Relator,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York, Respondent.

UNITED STATES OF AMERICA,
State, County, and Southern
District of New York, ss:

Walter Nelles, being duly sworn, says:

I am one of the attorneys for the relator and have had personal charge of this proceeding. Upon the return of the writ of habeas corpus herein I presented a form of traverse or reply drawn for verification by the relator. As the relator was not personally produced, it could not be verified by him and was filed without verification. The record therefore fails to present the issue (sought to be sustained by matters of judicial cognizance) as to the illegality of indefinite imprisonment of the relator under guise of awaiting an opportunity for deportation, and this issue was ignored in the opinion filed herein on April 12th or 13th, 1922. Section 760, U. S. Revised Statutes, which prescribes that traverse or reply should be under oath, provides also that the return and all suggestions made against it may be amended by leave of the Court or judge, before or

after filing, so that thereby the material facts may be ascertained. I ask leave accordingly to file an amended traverse or reply, hereto annexed, presenting with greater particularity the issue intended to be raised by incorporation by reference in the original un-
65 verified traverse or reply of the allegations contained in Article (4) of the petition.

In said opinion filed herein the Court makes a point of an apparent failure of counsel for the relator at the deportation hearing to object to Exhibit J 1 (Inspector Reiss's report of an examination of the relator at Moyemensing Prison), while objecting to other exhibits. I ask leave therefore to supplement the record with proof that counsel in the deportation proceeding did object to Exhibit J 1, specifically upon the ground relied upon in this habeas corpus proceeding, and in the only manner authorized or permitted by the rules governing deportation proceedings, as alleged in the annexed amended traverse or reply.

This proof, if the allegation is not admitted, would have to be taken by deposition at Washington, D. C. The obtaining of proof, or matter for submission for judicial notice, in support of the allegations of Article Second of said amended traverse or reply if not admitted, would also involve expense and delay, although the facts alleged are believed to be obviously and indisputably correct. I therefore ask that the respondent be required to file an additional or supplemental return admitting or denying the allegations of the amended traverse or reply.

I ask also for rehearing upon the issues arising upon the amended traverse or reply, and that entry of an order dismissing or sustaining the writ be deferred pending such rehearing.

WALTER NELLES.

Subscribed and sworn to before me this 14th day of April, 1922.

CAROL WEISS KING,
Notary Public.

New York Co. Clerk's No. 310.
New York Co. Register's No. 4203.
Commission expires March 30, 1924.

66 [Endorsed:] U. S. District Court. Filed May 3, 1922.
S. D. of N. Y.

67 At a Special Term of the United States District Court, Southern District of New York, Held in the United States Courts and Post Office Building, Borough of Manhattan, City of New York, on the 27th Day of April, 1922.

Present: Honorable Augustus N. Hand, United States District Judge.

UNITED STATES OF AMERICA ex Rel. MICHAEL BILOKUMSKY, Relator,

against

ROBERT E. TODD, Commissioner of Immigration at the Port of New York, Respondent.

A motion having come on to be heard before me on the 15th day of April, 1922, requiring the respondent to file a supplemental or additional return, and after hearing Walter Nelles, Esq., of counsel, in support thereof, and James C. Thomas, Jr., Esq., Assistant United States Attorney, in opposition thereto.

Now on motion of William Hayward, United States Attorney, it is
Ordered that the amended traverse of the relator be and the same hereby is filed herewith, and it is
Further ordered that the respondent file an amended supplemental or additional return stating which allegations of said amended traverse or reply are admitted, and which, if any, are controverted.

AUGUSTUS N. HAND,
U. S. D. J.

68 [Endorsed:] U. S. District Court. Filed April 27/1922. S. D., N. Y.

69 United States District Court, Southern District of New York.

M 7/81.

UNITED STATES OF AMERICA ex Rel. MICHAEL BILOKUMSKY, Relator,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York, Respondent.

Supplemental Return.

STATE OF NEW YORK,
Southern District of New York, ss:

Richard C. N. Werrich being duly sworn, says that he is and during all the times herein mentioned has been an immigrant inspector in the service of the United States; that he is attached to the Law Department of the immigration service of the United States at Ellis

Island, New York; that he in his official capacity is authorized to make and in behalf of the respondent makes the following supplemental return to the amended traverse of the relator herein filed pursuant to an order of this Court:

First. Admits that Rule 22, Subdivision 5 (*b*) is as stated in the amended traverse of the relator and alleges that Subdivision 5 (*b*) contains the following language in addition to that set forth in the amended traverse of relator:

If during the hearing it shall appear to the examining inspector that there exists a reason additional to those stated in the warrant of arrest why the alien is in the country in violation of law, the alien's attention shall be directed to the facts which constitute such reason, and he shall be given an opportunity to show cause why he should not be deported therefor.

(*c*) At the close of the hearing the full record shall be for-
70 warded to the Bureau, together with any written argument submitted by counsel and the recommendations of the examining officer and the officer in charge, for determination as to whether or not a deportation warrant shall issue.

Respondent admits further that a brief was received by the immigration service at Philadelphia on July 15, 1921, a part of which brief is contained in the amended traverse herein filed.

Second. Denies that the relator was imprisoned and detained in the custody of the respondent since the issuing of the warrant of deportation but respectfully alleges the true fact to be that the relator was released on bail on June 13, 1921 in the sum of $1,000, and that the Department of Labor directed the sureties to surrender the alien at the Philadelphia Station on the 13th day of February, 1922 for deportation. Respondent further denies any knowledge or information thereof sufficient to form a belief as to the truth of the statement that the respondent cannot comply with the commands of the warrant for the relator's deportation within a reasonable time and alleges the true fact to be as follows: That the verification of landing, a copy of which has been filed as a part of the return herein, shows that when the alien herein entered the United States, ex S. S. "Marion" in 1912, he was a native of Russia, born in Andrejowka. That this city is located in what is now Ukrainia. That the Commissioner of Immigration of the Port of New York is in possession of a new Ukrainian passport and the deportation of Michael Bilokumsky to Ukrainia will be proceeded with as soon as the United States Attorney for the Southern District of New York as the attorney for respondent notifies the Commissioner of Immigration at the Port of New York that
the alien herein may be deported. Upon information and
71 belief the aliens who are deported to Ukrainia are landed at the Port of Odessa, Ukrainia. Respondent denies that the alien herein is deprived of life, liberty and property without due process of law and denies that his holding is in violation of Article

13 of amendments to the Constitution of the United States of America.

Wherefore deponent prays that the writ of habeas corpus herein be dismissed and the said alien remanded to the custody of the Commissioner of Immigration at Ellis Island, New York, to be dealt with in accordance with the provisions of the Immigration Law.

RICHARD C. N. WERRICH.

Sworn to before me this 28" day of April, 1922.
[SEAL.]
CARL BRECHER,
Notary Public, Kings County.

Clerk's No. 496. Register's No. 3178.
N. Y. Clerk's No. 317. Reg.'s No. 3340.
Commission expires March 30, 1923.

72 [Endorsed:] U. S. District Court, S. D. of N. Y. Filed May 1, 1922.

73 United States District Court, Southern District of New York.

M. 7/81.

UNITED STATES OF AMERICA ex Rel. MICHAEL BILOKUMSKY, Relator,

against

ROBERT E. TODD, Commissioner of Immigration at the Port of New York, Respondent.

It is hereby stipulated by and between the attorneys for the parties hereto that at the time when the writ of habeas corpus herein was applied for and issued, the relator was detained in the custody of the respondent; and that this stipulation may be filed herein as part of the record herein.

Dated, New York, May 3, 1922.

WM. HAYWARD,
United States Attorney for the Southern District of New York.
HALE, NELLES & SHORR,
Attorneys for Relator.

So ordered May 4, 1922.

AUGUSTUS N. HAND,
United States District Judge.

U. S. District Court, S. D. of N. Y. Filed May 4, 1922.

74 At a Special Term of the United States District Court, Southern District of New York, Held in the United States Courts and Post Office Building, Borough of Manhattan, City of New York, on the 4 Day of May, 1922.

Present: Honorable Augustus N. Hand, United States District Judge.

UNITED STATES OF AMERICA ex Rel. MICHAEL BILOKUMSKY, Relator,

against

ROBERT E. TODD, Commissioner of Immigration at the Port of New York, Respondent.

The petition and writ of habeas corpus for the release of the above named relator having come on to be heard before this Court on the 7th day of April, 1922, and the respondent having filed a return to said petition and writ, and the relator having filed a traverse to the return, and the application having duly come on to be heard before this Court, and after hearing Messrs. Hale, Nelles & Shorr, Esqs., attorneys for the relator by Walter Nelles, Esq., of counsel in support thereof, and James C. Thomas, Jr., Esq., Assistant United States Attorney, in opposition thereof, and relator having filed an amended traverse and the respondent having filed a supplemental return, and this Court having filed an opinion on April 12, 1922, it is

Ordered that the said writ of habeas corpus be and the same hereby is dismissed, and the relator be and he hereby is remanded to the custody of the United States Commissioner of Immigration at the Port of New York. And it is further

75 Ordered that the relator Michael Bilokumsky be discharged into his own custody upon furnishing a bond for his appearance in the sum of $1,000, to be approved by the Court, and by filing a petition for appeal, assignment of errors, order allowing the appeal and citation within ten days from the entry hereof, pending the determination of the appeal herein, to the United States; Circuit Court of Appeals; and it is further

Ordered that upon the giving of said bond, and perfecting the appeal as hereinabove provided that all proceedings on the part of the Commissioner of Immigration at the Port of New York, be and hereby are stayed from deporting the said Michael Bilokumsky, until further order of this Court.

AUGUSTUS N. HAND,
U. S. D. J.

76 [Endorsed:] U. S. District Court, S. D. of N. Y. Filed May 5, 1922.

77 United States District Court, Southern District of New York.

#756.

UNITED STATES OF AMERICA ex Rel. MICHAEL BILOKUMSKY, Relator,

against

ROBERT E. TODD, Commissioner of Immigration at the Port of New York.

Hale, Nelles & Shorr, Attorneys for Relator.
Walter Nelles and Isaac Shorr, Counsel.
William Hayward, United States Attorney, For Respondent, Commissioner of Immigration at the Port of New York; James G. Thomas, Asst. U. S. Attorney.

AUGUSTUS N. HAND, *District Judge:*

This case comes up on a writ of habeas corpus sued for because of the alleged unlawful deportation of the relator. The ground of deportation is that the relator knowingly had in his possession for the purpose of circulation, distribution, publication or displaying, written or printed matter, advising, advocating or touching the overthrow by force or violence of the government of the United
78 States. A hearing was had at Philadelphia, before the Immigrant Inspector, at which the relator was represented by Counsel, under whose advice the relator refused to answer the questions put to him. His counsel also cross-examined at length the patrolman who arrested Bilokumsky, in Philadelphia, where Bilokumsky's companion was distributing circulars which the patrolman testified advocated the overthrow of the Government of the United States. Similar circulars were found on Bilokumsky.

I do not understand it to be contended by counsel for Bilokumsky that there was not evidence sufficient to deport him if it was properly established that he was an alien. As he gave no testimony at the formal hearing, and the testimony of the patrolman was directed to matters other than citizenship, and especially to the finding of the radical circulars upon the relator, and to the fact that he accompanied a friend who was distributing them on the street, there is no testimony tending to establish that the relator was an alien, other than the deposition which the alien made on April 29, 1921, under oath, a number of weeks before the formal hearing. This deposition was made before the Inspector shortly after the arrest of Bilokumsky by the police, and while he was in jail in Philadelphia.

He was not represented by counsel and his statement con-
79 tributed nothing to the Government's case except his answer to the last question:

—. "Did you ever take out naturalization papers?
A. Never took out first or full papers."

He had previously stated that he was born in Russia, and arrived in this country in 1912. This statement taken while in prison, and without counsel, was offered in evidence at the hearing where his counsel was present, and appears to be the document referred to by the inspector at p. 2 of the minutes of the hearing as "a copy of sworn statement made by alien in Moyemensing Prison, Philadelphia, Pa., April 29, 1921, to Chas. C. Rice, Immigrant Inspector, marked J-1. Although prisoner's counsel objected, according to the minutes, to the introduction of Exhibits J-2, 3, 4, which are stated in the record to have been circulars and stickers, there is no record of any objection to the alien's sworn statement. Very likely his counsel regarded it as unobjectionable because it contained no admissions of violation of law. It is probably the case, in view of the decision of the Supreme Court in Low Wah Suey v. Backus, 225 U. S. 460, that the interrogation of an alien in the absence of counsel, if there was no circumstance of oppressive conduct, would neither invalidate the hearing where counsel were present, nor be in itself inadmissible as evidence. Counsel for relator says that the present rule of the Department which requires the alien at the beginning of the hearing under a warrant of arrest to state whether he desires
counsel, or waives the same, makes any statement made by an
80 alien after arrest and before notification of his right to counsel invalid. In this case the departmental warrant of arrest was on May 14, some time after the Inspector of Immigration interrogated the alien in the Moyemensing Prison. He was apparently held there under an arrest made by the Philadelphia City Authorities. The rule provides that the alien shall be apprised of his right to counsel at the "beginning of the hearing under the warrant of arrest," (Rule 22, subd. 5-*b*), and this rule was apparently complied with.

The writ must be dismissed for the reason that (1) the alien was accorded a hearing, (2) any objection which might have been had to the offering of evidence based on the alien's deposition taken in the Moyemensing Jail was waived by the failure of his counsel to object to its introduction at the hearing before the Immigration Inspector.

A. N. H.,
D. J.

April 12, 1922.

U. S. District Court, S. D. of N. Y. Filed April 12, 1922.

81 United States District Court, Southern District of New York.

#760.

UNITED STATES OF AMERICA ex Rel. MICHAEL BILOKUMSKY, Relator,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York.

Hale, Nelles & Shorr, Attorneys for Relator, Walter Nelles, Counsel.

William Hayward, United States Attorney, for respondent, Commissioner of Immigration at the Port of New York; James G. Thomas, Asst. U. S. Attorney.

AUGUSTUS N. HAND, *District Judge:*

The amended record filed since my decision in this case on April 12th discloses that the attorney for the relator did object in a written brief filed in the Department of Labor to the admissibility of the statement of the relator taken while he was in prison and without counsel, and also to the landing certificate. The relator was accorded counsel at the regular hearing and the absence of counsel at the time he was interrogated, though after his arrest, does
82 not I think in view of the decision in Low Wah Suey v. Backus, 225 U. S. 460, render the statement by the relator in prison inadmissible.

A. N. H.,
D. J.

May 4, 1922.

83 U. S. District Court, S. D. of N. Y. Filed May 4, 1922.

84 *Order Allowing Appeal.*

United States District Court, Southern District of New York.

M 7/81.

UNITED STATES OF AMERICA ex Rel. MICHAEL BILOKUMSKY, Relator,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York, Respondent.

Upon reading the petition for appeal herein and on consideration of the assignment of errors presented therewith, it is

Ordered that the appeal prayed for be and it hereby is allowed and that a certified transcript of the record and proceedings herein be transmitted to the Supreme Court of the United States, and it is further

Ordered that the operation of the order dismissing the writ of habeas corpus herein and remanding the relator to the custody of the respondent be and it is hereby stayed for ten days and pending the determination of the appeal herein upon the relator's furnishing bail within such ten days, and that pending determination of said appeal the relator be admitted to bail in the sum of One Thousand ($1,000) Dollars.

Dated, New York, May 11th, 1922.

AUGUSTUS N. HAND,
United States District Judge.

U. S. District Court, S. D. of N. Y. Filed May 11, 1922.

Copy Received May 22, '22.
WM. HAYWARD,
U. S. Att'y.

85 *Petition for Appeal.*

United States District Court, Southern District of New York.

M 7/81.

UNITED STATES OF AMERICA ex Rel. MICHAEL BILOKUMSKY, Relator,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York, Respondent.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

Now comes the relator, Michael Bilokumsky, by Hale, Nelles & Shorr, his attorneys, and respectfully shows that an order was made and filed in this Court on May 5, 1922, dismissing the writ of habeas corpus herein and remanding him to the custody of the United States Commissioner of Immigration at the Port of New York and that in and by said order manifest error was committed, as appears from your petitioner's assignment of errors filed herein; and your petitioner appeals to the Supreme Court of the United States from said order and prays that his appeal be allowed and a citation issued in accordance with law and that a transcript of the record and proceedings upon which said decree was made, duly authenticated, be sent to the Supreme Court of the United States pursuant to the rules and provisions of law in such case made and provided.

86 And your petitioner further prays that he be admitted to bail pending the determination of his appeal by the said Court.

Dated, New York, May —, 1922.

MICHAEL BILOKUMSKY,
Petitioner.

HALE, NELLES & SHORR,
Attorneys for Petitioner.

80 East 11th Street, New York City.

U. S. District Court, S. D. of N. Y. Filed May 11, 1922.

Copy Received May 22, '22.
WM. HAYWARD,
U. S. Att'y.

87 *Assignment of Errors.*

United States District Court, Southern District of New York.

M 7/81.

UNITED STATES OF AMERICA ex Rel. MICHAEL BILOKUMSKY, Relator,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York, Respondent.

Now comes the relator above named and files the following assignment of errors upon which he will rely upon his prosecution of an appeal from the order of this Court made herein on the 5th day of May, 1922, alleging:

First. That the United States District Court for the Southern District of New York erred in dismissing the writ of habeas corpus herein.

Second. That said Court erred in not holding that in and by the proceedings in the Department of Labor as shown by the record herein, the relator was deprived of life, liberty and property without due process of law contrary to Article 5 of Amendments to the Constitution of the United States.

Third. That said Court erred in not holding that the detention of the relator by the respondent at the time the writ of habeas corpus herein was prayed for and obtained deprived him of rights secured under Article 4 of Amendments to the Constitution of the United States, providing that the right of the people to be secure in

88 their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourth. That said Court erred in not holding that the detention of the relator by the respondent at the time the writ of habeas corpus herein was prayed for and obtained deprived him of rights secured under Article 5 of Amendments to the Constitution of the United States, providing that no person shall be deprived of life, liberty or property without due process of law.

Fifth. That said Court erred in not holding that the detention of the relator by the respondent at the time the writ of habeas corpus herein was prayed for and obtained deprived him of rights secured under Article 13 of Amendments to the Constitution of the United States, providing that neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Sixth. That said Court erred in holding that the rules of the Department of Labor with respect to deportation proceedings appearing in the record herein were complied with in the case of the relator.

Seventh. That said Court erred in not holding that the detention of the relator at the time the writ of habeas corpus herein was obtained was unreasonable and amounted to indefinite imprisonment under the guise of awaiting opportunity for deportation.

89 Eighth. That said Court erred in not holding that the evidence upon which the finding of the Secretary of Labor as to the relator's alien status was made was unfair and inconsistent with the fundamental principles of justice embraced within the conception of due process of law.

Ninth. That said Court erred in not holding that the warrant for the deportation of the relator was based upon evasion and disregard by the United States Department of Labor of the Constitution and laws of the United States and of the rules of said department in such case made and provided.

Wherefore, the relator prays that said order be reversed, and that such other and further orders, directions, and decrees be made as shall be in accordance with law.

Dated, New York, May —, 1922.

Respectfully submitted,

MICHAEL BILOKUMSKY,
Relator.

HALE, NELLES & SHORR,
Attorneys for Relator.
80 East 11th Street New York City.

Endorsed: U. S. District Court S. D. of N. Y. Filed May 11, 1922.

90 *Citation.*

The President of the United States of America to Robert E. Tod, Commissioner of Immigration at the Port of New York, and William Hayward, Esq., United States Attorney for the Southern District of New York, and Harry M. Daugherty, Attorney General of the United States, Greeting:

You and each of you are hereby cited and admonished to be and appear in the United States Supreme Court in Washington, D. C., on or before the 10th day of June, 1922, from a final order or decree made, filed and entered in the office of the Clerk of the United States District Court for the Southern District of New York, on the 5th day of May, 1922, in a certain proceeding wherein Michael Bilokumsky, the relator, is appellant, and Robert E. Tod, Commissioner of Immigration at the Port of New York, is appellee, to show cause, if any there be, why said order or decree should not be corrected and why speedy justice should not be done to the parties on that behalf.

Given under my hand at the Borough of Manhattan, City of New York, on the 11th day of May, 1922.

AUGUSTUS N. HAND,
United States District Judge.

91 [Endorsed:] County Clerk's Index No. M. 7—81. United States District Court Southern District of New York. United States of America ex rel. Michael Bilokumsky, Relator, against Robert E. Tod, Commissioner of Immigration at the Port of New York, Respondent. Citation. Hale, Nelles & Shorr, Attorneys for Relator, 80 East 11th Street, New York City. U. S. District Court S. D. of N. Y. Filed May 11th, 1922. Copy received May 22/22. Wm. Hayward, U. S. Atty.

92 United States District Court for the Southern District of New York.

M. 7—81.

UNITED STATES OF AMERICA ex Rel. MICHAEL BILOKUMSKY, Relator,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York, Respondent.

Upon the annexed stipulation and the ann-xed affidavit of Isaac Shorr, verified July 12, 1922, it is

Ordered that the time of the relator herein as appellant to docket the case and file the record thereof with the Clerk of the United

States Supreme Court be and it hereby is enlarged until and including the 25th day of July, 1922.

Dated New York, July 14, 1922.

AUGUSTUS N. HAND,
United States District Judge.

Endorsed: U. S. District Court S. D. of N. Y., Filed July 15, 1922.

93 [Endorsed:] M. 7—81. United States District Court Souhtern District of New York. United States of America ex rel. Michael Bilokumsky, Relator vs. Robert E. Tod, Commissioner of Immigration at the Port of New York, Respondent. Stipulation and Order. U. S. District Court, S. D. of N. Y. Filed July 15, 1922.

94 *Stipulation on Appeal Record.*

United States District Court, Southern District of New York.

UNITED STATES OF AMERICA ex Rel. MICHAEL BILOKUMSKY, Relator,

vs.

ROBERT E. TODD, Commissioner of Immigration at the Port of New York, Respondent.

It is hereby Stipulated and Agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated New York, July 22, 1922.

HALE, NELLES & SHORR,
Attorney- for Relator.
WILLIAM HAYWARD,
Attorney for Respondent.

[Endorsed:] United States District Court, Southern District of New York. Stipulation as to Correctness of Appeal Record.

95 UNITED STATES OF AMERICA,
Southern District of New York, ss:

UNITED STATES OF AMERICA ex Rel. MICHAEL BILOKUMSKY, Relator,

vs.

ROBERT E. TODD, Commissioner of Immigration at the Port of New York, Respondent.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 24th day of July, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the said United States the one hundred and forty-seventh.

[Seal of District Court of the United States, Southern District of New York.]

ALEX. GILCHRIST, JR.,
Clerk.

[Endorsed:] United States District Court, Southern District of New York. United States of America, ex Rel. Michael Bilokumsky, Relator, vs. Robert E. Todd, Commissioner of Immigration at the Port of New York, Respondent. Transcript of Record on Appeal.

Endorsed on cover: File No. 29,068. S. New York D. C. U. S. Term No. 518. The United States of America ex Rel. Michael Bilokumsky, appellant, vs. Robert E. Tod, commissioner of immigration at the port of New York, et al. Filed July 31st, 1922. File No. 29,068.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1923

No. 92

UNITED STATES OF AMERICA ex Rel. MICHAEL BILOKUMSKY, Appellant,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York.

It is hereby stipulated and agreed by and between the attorneys for the parties hereto that the return to writ of habeas corpus in the case of United States ex rel. Mansevich v. Tod, which was by mistake printed as part of the record in the above case at pages 8-13 thereof, be stricken from the printed record in the above case and that the return to the writ of habeas corpus in the above case, a copy of which is hereto annexed, with this stipulation, may be printed by the clerk and added to the record in the above case in lieu thereof.

Dated, September 20, 1923.

James M. Beck, Solicitor General of the U. S. —— ——, United States Attorney for the Southern District of New York. Walter Nelles, Isaac Shorr, Attorneys for Appellant.

[Endorsed:] County Clerk's Index No. —. —— —, 192–. United States Supreme Court. United States of America ex rel. Michael Bilokumsky, Appellant, against Robert E. Tod, Commissioner of Immigration at the Port of New York. Stipulation. Hale, Nelles & Shorr, Attorneys for Appellant, 80 East 11th Street, New York City.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

M 7/81

UNITED STATES OF AMERICA ex Rel. MICHAEL BILOKUMSKY, Relator,

vs.

ROBERT E. TOD, Commissioner of Immigration at the Port of New York, Respondent.

RETURN TO WRIT OF HABEAS CORPUS

SOUTHERN DISTRICT OF NEW YORK, ss:

John M. Lyons being duly sworn, says that he is and during all the times herein mentioned has been an immigrant inspector in the

service of the United States; that he is attached to the Law Department of the Immigration Service of the United States at Ellis Island, New York; that he in his official capacity is authorized to make and in behalf of the respondent hereby makes the following return to the writ of habeas corpus herein.

In compliance with the direction of this Court, the body of the said alien in his own proper person is produced herewith before this Court at the time specified in the writ.

It is respectfully urged that upon its face the petition upon which the writ was granted is insufficient in law, and that the writ should therefore be quashed because

(a) The petition does not allege facts to show that the proceedings of the Department of Labor upon which was issued the warrant of deportation pursuant to which the said alien is held, were not regular, fair and in compliance with the statute applicable in such cases, nor facts from which this Court can determine that the proceedings were either irregular, unfair or not in compliance with said statute;

(b) The petition does not allege any facts which entitled this Court to review the findings and conclusion of the Department of Labor upon which the warrant of deportation was issued;

(c) It is not alleged that there was no evidence before the Department of Labor upon which it based or could have based its findings and conclusion in accordance with which the warrant of deportation was issued;

(d) It does not appear by allegations of facts that the issues sought by the petition now to be litigated in this Court have not already been determined by the Department of Labor adversely to the said alien in proceedings which were regular, fair and in compliance with the statute applicable thereto.

As appears by the records of the Department of Labor of the United States with respect to the above named alien, copies of which are produced and filed herewith as part of this return:

(1) On May 14, 1921, a warrant of arrest was duly issued by the Department of Labor authorizing the arrest of the alien Michael Bilokumsky herein for the reason as stated in the warrant as follows:

"That he writes, publishes, or causes to be written, or published, or knowingly circulates, distributes, prints, or displays, or knowingly causes to be circulated, distributed, printed, published, or displayed, or knowingly had in his possession for the purpose of circulation, distribution, publication, or display, written or printed matter, advising, advocating, or teaching the overthrow by force or violence of the Government of the United States or of all forms of law."

That thereafter the alien herein was arrested and was given a hearing at No. 136 South Third Street, Philadelphia, Pa. on June

24, 1921. That there were present at the hearing A. G. Benkhart, Immigration Inspector, M. C. Smith, Stenographer and I. Lasker Greenberg, Counsel for alien. The warrant of arrest and evidence on which same was issued was duly reviewed by counsel and the warrant of arrest read and explained by the inspector to the alien. Upon the said hearing, proceedings were had, testimony taken and other evidence introduced as appears by the minutes of the said hearing, a copy of which is hereto annexed and made a part of this report.

There was duly entered, introduced and made a part of the evidence a circular entitled "May Day of Revolution," a copy of which is attached to this return and made a part as if herein specifically set forth.

The alien herein refusing to answer any questions put before him at this hearing on the advice of his counsel, the evidence taken at the Moyamensing Prison at Philadelphia, Pa. on April 29, 1921, a copy of which is hereto attached and made a part of this return, was duly entered into the evidence and made a part of this hearing.

A certificate of admission of alien showing his arrival and description was introduced in the evidence and made a part thereof, a copy of which is hereto attached to this return.

That thereafter recommendations were duly made to the Department of Labor that the alien herein together with others who had been arrested at the same time be deported.

(2) That on August 8, 1921, after a careful examination of the evidence submitted in this case, the Department being of the opinion that the alien is in the United States in violation of law, the Secretary of Labor duly issued a warrant of deportation No. 55009/76 directed against the alien herein Michael Bilokumsky on the ground that he has been found in the United States in violation of the Act of October 16, 1918, as amended by the Act of June 5, 1920.

"That he writes, publishes, or causes to be written, or published, or knowingly circulates, distributes, prints, or displays, or knowingly causes to be circulated, distributed, printed, published, or displayed, or knowingly had in his possession for the purpose of circulation, distribution, publication, or display, written or printed matter, advising, advocating, or teaching the overthrow by force or violance of the Government of the United States or of all forms of law."

(3) That the alien Michael Bilokumsky is at present at Ellis Island held under and in obedience to the writ of habeas corpus issued herein.

(4) As appears by the minutes and exhibits aforesaid, the alien was duly informed and apprised of the charges against him; the alien was afforded a full, complete and fair hearing by the Department of Labor upon the said charges; the said alien was afforded a full, complete and fair opportunity to answer and to submit evidence upon such charges and for cause of the detention of the said

alien complained in the petition herein, deponent says that since the receipt of the said writ of habeas corpus, the said alien has been held under and in obedience to said writ.

The respondent respectfully denies any knowledge or information thereof sufficient to form a belief as to the truth of the allegations as to the petition herein except that which is specifically admitted in the return filed herein.

Wherefore, deponent prays that the writ of habeas corpus herein be dismissed and the said alien remanded to the custody of the Commissioner of Immigration at Ellis Island, New York, to be dealt with in accordance with the provisions of the Immigration Law.

John M. Lyons.

Sworn to before me this 7th day of April, 1922. (Sgd.) Carl Brecher. Notary Public, Kings County. Clerk's No. 496. Register's No. 3178. N. Y. Clerk's No. 317. Reg.'s No. 3340. (Seal.) Commission expires March 30, 1923.

[Endorsed:] 92—29068. U. S. District Court, Southern District of New York. United States of America ex rel. Michael Bilokumsky, Relator, versus Robert E. Tod, Commissioner of Immigration at the Port of New York, Respondent. Return to writ of habeas corpus. William Hayward, United States Attorney, Attorney for Respondent. Due service of a copy of the within is hereby admitted. Received Sep. 25, 1923. Office of the Clerk, Supreme Court U. S.

[Endorsed:] File No. 29,068. Supreme Court U. S., October Term, 1923. Term No. 92. The United States ex rel. Michael Bilokumsky, Appellant, vs. Robert E. Tod, Commissioner of Immigration, etc. Return to writ of habeas corpus and stipulation to insert same in record. Filed Sept. 25, 1923.

To be argued by

WALTER NELLES.

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 92.

(October Term, 1922, No. 518.)

THE UNITED STATES OF AMERICA ex rel. MICHAEL BILOKUMSKY, Appellant,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York, Respondent.

BRIEF FOR APPELLANT.

Statement of Facts.

This is a direct appeal to this Court from an order of the United States District Court for the Southern District of New York dismissing a writ of habeas corpus (Record, p. 47). It presents ques-

tions under the Fourth and Fifth Amendments to the Constitution of the United States.

Bilokumsky was one of about forty persons arrested by the Philadelphia police on April 26, 1921 (Record, pp. 15, 36). He was held by the city authorities for several weeks in Moyamensing Prison, but the charge of violation of state law under which he was held was finally dropped (Record, p. 24).

The warrant for his arrest in deportation proceedings was not issued by the immigration authorities until May 19, 1921 (Record, pp. 34-35). Before this, while he and the others arrested at the same time were at Moyamensing Prison, the immigration authorities entered into a co-operative arrangement with the city authorities with respect to these prisoners. Immigrant Inspector Benkart reported as follows to his superior on July 11, 1921:

> "With a view to ridding this country of such undesirables, the Mayor and his Cabinet, and the local Division of Investigations, Department of Justice, co-operated with this Service. The co-operation has been full and complete. The arrests were made on April 25-26, and while in the custody of the City authorities the aliens were interviewed under oath to determine their status" (Record, p. 36).

Pursuant to this co-operative arrangement, Bilokumsky was examined by an immigrant inspector at Moyamensing Prison on April 29, 1921, as if in deportation proceedings (Record, pp. 3-5, 31-33). The record of this examination commences:

"EXHIBIT J-1.

MEYAMENSING PRISON,
Philadelphia, Pa.

April 29, 1921.

Alien duly sworn, testifies as follows:" (Record, p. 3).

The record concludes:

"Certified correct copy of stenographic notes of hearing taken by me.

CHAS. B. REISS,
Immigrant Inspector,
(Examining Inspector and Stenographer)"

(Record, p. 5).

The record thus certified purports to record testimony by Bilokumsky to the effect that he arrived in the United States from Russia at Philadelphia on the S. S. Merian on November 10, 1912, and had never been naturalized (Record, pp. 3-4).

At this examination the immigrant inspector was obviously in custody and exercising compulsion over Bilokumsky's person and Bilokumsky was not advised that he was not under compulsion to answer questions. Nor was he advised of his right to counsel or given any opportunity to take measures to secure an impartial conduct and correct record of the hearing.

The record of this hearing as certified by the immigrant inspector was the basis of the subsequent issuance of a warrant for his arrest in a deportation proceeding, and was put in evidence against him in that proceeding. The inspector in charge of the proceedings said (Record, p. 14):

"(By Inspector:) As it is evident that it is impossible to secure information from the alien touching on his status and his right to be and remain in the United States, I will introduce as evidence in this case and make same a part of the record marked Exhibit J, a certificate of alien's landing in the United States.

"I also introduce as evidence and make same a part of the record in this case, a copy of sworn statement made by alien in Moyamensing Prison, Philadelphia, Pa., April 29th, 1921, to Chas. B. Reiss, Immigrant Inspector, marked J-1."

The landing certificate which the inspector thus introduced related to one Michael Bialokon (Record, p. 33) and was not connected with Bilokumsky unless by the record of his examination by Immigrant Inspector Reiss at Moyamensing Prison. *There was no other evidence upon the issue of his alien status.* He was, however, ordered deported (Record, p. 7), and was in the custody of the immigration authorities for deportation when the writ of habeas corpus in this case was sued out.

The single point involved in this appeal is that the examination of Bilokumsky at Moyamensing Prison and the use of it in the subsequent deportation proceeding were contrary to the Fourth and Fifth Amendments to the Constitution of the United States.

Opinions of the District Court.

The District Court (Augustus N. Hand, D. J.) filed two opinions. In the first (Record, pp. 48-49) the Court relied strongly upon the ground that Bilokumsky's counsel in the deportation proceed-

ing did not appear to have objected to the use in evidence of the examination at Moyamensing Prison. An amended return was then filed by leave of the District Court in which was set forth the rule of the Department of Labor that "objections and exceptions of counsel shall not be entered on the record, but may be entered by him in an accompanying brief"; together with an extract from the brief filed by counsel for Bilokumsky in the deportation proceeding showing that objections to both the landing certificate and the examination at Moyamensing Prison were duly made (Record, pp. 40-41). This was admitted by the respondent's supplemental return (Record, p. 45). The District Court then filed a second opinion in which he held that, even though objection was duly taken, the examination at Moyamensing Prison was not, in view of the decision in *Low Wah Suey* v. *Backus*, 225 U. S. 460, inadmissible.

Specification of Errors and Outline of Argument.

The point raised below as to indefinite detention was met by the supplemental return (Record, p. 45), and is therefore not argued. The substance of the assignments of error (Record, pp. 52-53) relied upon is this:

> That the District Court erred in not holding that the use by the Department of Labor in the deportation proceeding of its examination of Bilokumsky at Moyamensing Prison in violation both of the Fourth Amendment and of its own rules was a denial of due process of law.

In this brief we shall treat first the narrower point that by the examination at Moyamensing

Prison and its subsequent use of it the Department of Labor denied the due process and application of its own explicit rules.

We shall then press the broader proposition that, irrespective of the Department's rules, the use of such evidence is inconsistent with the fundamental principles of justice embraced within the conception of due process of law.

POINT I.

By the examination at Moyamensing Prison and its subsequent use of it the Department of Labor denied the due process and application of its own explicit rules.

The inspectors of the Immigration Service have no right to violate the Fourth Amendment. They may not seize the body of a suspect except under a warrant. And a warrant can issue only upon probable cause supported by oath or affirmation. This is required not only by the Fourth Amendment, but also by the Immigration Law and Rules of the Department of Labor under which they act. Immigrant inspectors may subject a person to examination or hearing only after issuance of a warrant and submission of the evidence supporting it to the alien's scrutiny as provided by the rules of the Department of Labor. They are not authorized by those rules to compel aliens or others to answer questions against their will. Agents of the Department of Justice testifying against aliens in deportation proceedings have frequently availed themselves of the right to decline to answer at will.

The following rules of the Department of Labor as to the issuance of warrants and conduct of hearings thereunder were in force at the time of the proceedings in this case:

> "Rule 22, Subd. 3. *Application for warrant of arrest.*—The application must state facts showing *prima facie* that the alien comes within one or more of the classes subject to deportation after entry, and, except in cases in which the burden of proof is upon the alien (Chinese) involved, should be accompanied by some substantial supporting evidence."
>
> "Rule 22, Subd. 5 (a). Upon receipt of a telegraphic or written warrant of arrest the alien shall be taken before the person or persons therein named or described and granted a hearing to enable him to show cause, if any there be, why he should not be deported. If the alien is unable to speak or understand English, an interpreter should be employed where practicable."
>
> "Rule 22, Subd. 5 (b). At the beginning of the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued, and shall be apprised that he may be represented by counsel. The alien shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the conduct of the hearing."

The departmental warrant in this case was not issued until May 19, 1921 (Record, pp. 34-35). Prior to that date an immigration inspector by virtue of the "full and complete co-operation" of

the city authorities who had him in custody (Record, p. 36), made himself a partner in the imprisonment of Bilokumsky and subjected him to interrogation at Moyamensing Prison. Bilokumsky was given no inkling that the interrogation was not compulsory. It was as truly an illegal search of Bilokumsky as the inspector's assumption of custody was an illegal seizure of his person. The examination was given the form and manner of a hearing under a warrant of arrest. The record recites that Bilokumsky was duly sworn and is certified by the inspector-stenographer over his official title as "a correct copy of stenographic notes of hearing." But Bilokumsky was not, of course, allowed to inspect any warrant and supporting evidence; none such existed. Nor was he apprised of his right to counsel. He was entirely deprived of the opportunity to protect himself against unfair practices which the departmental rules contemplate.

The departmental rules above set forth were ignored as completely as if they were non-existant.

Neither of the opinions filed by the District Court addresses itself to the substantive question of the denial to Bilokumsky by the officials of the Department of Labor of the due process of their own rules. The first opinion (Record, pp. 48-49) relies strongly upon the apparent absence of any record of objections by the prisoner's counsel to the use in evidence of the examination at Moyamensing Prison in the proceedings under the subsequently issued warrant. The additional opinion of the District Court (Record, p. 50) recognizes that this ground of decision is removed by the amended traverse (Record, pp. 40-41), which shows that objection was duly taken in accordance with the rules and practice of the Immigration Department. The Court

disposed of the case, however, as if it presented only a question of the prisoner's right to counsel—and as if that question were abstract and not affected by the express rules of the Department. The Court concluded:

> "The relator was accorded counsel at the regular hearing and the absence of counsel at the time he was interrogated, though after his arrest, does not I think in view of the decision in *Low Wah Suey* v. *Backus,* 225 U. S. 460, render the statement by the relator in prison inadmisible" (Record, p. 50).

The decision of this Court thus relied upon by the District Court is not an authority upon the point of due process and application of the Department's explicit rules. There was no claim in the case of *Low Wah Suey* v. *Backus* that departmental rules were evaded. The question was as to the constitutional validity of certain former rules of the Department which are now superseded by those above set forth under which the prisoner is entitled to counsel from the outset of the proceedings. The Court said:

> "It is alleged that the rules of the Secretary of Commerce and Labor are arbitrary and illegal, particularly certain sections of Rule 35. From these rules, it appears that, while provision is made for an examination in the absence of counsel, it is provided that a hearing shall be had at which the alien shall have full opportunity to show cause why he should not be deported, and that, at such stage of the proceedings as the person before whom the hearing is held shall deem proper, the alien shall be apprised that he may thereafter be represented by counsel."
>
> *Low Wah Suey* v. *Backus,* 225 U. S. at 471.

The decision of this Court, apparently given not altogether without hesitation, was that:

> "We are not prepared to say that the rules are so arbitrary and so manifestly intended to deprive the alien of a fair, though summary, hearing as to be beyond the power of the Secretary of Commerce and Labor under the authority of the statute" (472).

This question of the limits of departmental authority and discretion in the matter of rule making is entirely other than the question of due application and administration of such rules as the Department, in the exercise of its undoubted authority and discretion, sees fit to promulgate.

These rules have the effect of law and are as binding upon the Department of Labor as is the statute under which they are promulgated.

Caha v. *United States,* 152 U. S. 211, 218.

It may be granted that it is an act of grace for the Department of Labor to award a right of counsel from the outset of proceedings instead of at a subsequent time. But, as District Judge Knox said in *United States ex rel. Weinstein* v. *Uhl,* 266 Fed. 929, 932 (holding that refusal to release on bail a prisoner who refused to answer questions was a denial to him of the due process of the departmental rules as to bail):

> "When the Department of Labor exercises its authority and in so doing accords to an alien rights and privileges which the law says may be accorded to him, I fail to see why the alien is not entitled to their enjoyment."

Valid rules having the force of law may not be cheated even by the power which makes them.

POINT II.

Irrespective of the Department's rules the use of the examination of Bilokumsky at Moyamensing Prison is inconsistent with the fundamental principles of justice embraced within the conception of due process of law.

Due process of law requires that a person whom the law may subject to a loss or penalty be given a hearing. It may be summary. But it must be a fair hearing. The evidence must be of such a character and be so taken and recorded as not to raise a danger or suspicion of foul play. Thus in *Kwack Jan Fat* v. *White*, 253 U. S. 544, 549, where an inspector failed to record in the proper place and manner important testimony which had been adduced, this Court held that the hearing

> "was unfair and inconsistent with the fundamental principles of justice embraced within the conception of due process of law."

It would seem to go without saying that if a judgment of deportation is to rest upon statements or admissions attributed to the person to be deported, those statements or admissions must have been made by him as a free agent, and under circumstances which raise no doubt as to whether they were in fact made as reported. To sanction as a precedent for dealing with suspected aliens the practice adopted in this case would open a wide door for foul practices. It would establish as due process of law the right to deport an ignorant and helpless prisoner upon a statement privately taken

in prison by an official wearing at the same time and moment the multiform aspect of jailer, accuser, prosecutor, stenographer and judge.

While a deportation proceeding is not technically criminal, it involves imprisonment often more rigorous than that of persons accused of crime, and the penalty of deportation is in many cases more terrible in operation than a long term in State's Prison. The observations of this Court in *Brown v. Walker,* 161 U. S. 561, at pp. 596 and 597, apply with the same force to deportation as to criminal proceedings:

> "The maxim *nemo tenetur sepsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant to push him in a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udel, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the Eng-

> lish criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but a general and silent acquiescence of the courts in a popular demand."

This case presents a state of facts strongly similar to those in *United States* v. *Kallas*, 272 Fed. Rep. 742, a case decided in the United States District Court for the Western District of Washington. In that case, as here, federal agents by co-operation with city authorities obtained an opportunity to question the accused while he was imprisoned in a city jail. On the basis of admissions alleged to have been "voluntarily" made by him at this interrogation, he was held by a United States Commissioner to answer a charge of violation of the Mann Act. District Judge Cushman sustained a writ of habeas corpus, saying at page 752:

> "The questioning by or with the consent of his official captor of a prisoner is essentially inquisitorial in its nature. He is confined, and must perforce submit to such questions. True, he may remain silent; but he cannot escape the questions as he might if he were physically free. The actual existence of duress, arising from the fact that he is confined and cannot escape his questioner, is sufficient, and requires that he be advised that he be not compelled to answer, and, if he does so, his answers will be used against him."

The principles repeatedly announced by this Court as to the non-admissibility in the federal courts of evidence obtained by federal authorities as a result of illegal search and seizure are fully applicable.

Gouled v. *United States*, 255 U. S. 298.
Silverthorne Lumber Co. v. *United States*, 251 U. S. 385.
Weeks v. *United States*, 232 U. S. 383.
Boyd v. *United States*, 116 U. S. 616.
Flagg v. *United States*, 233 Fed. Rep. 481.
United States v. *Mounday*, 208 Fed. Rep. 186.
United States v. *Mills*, 185 Fed. Rep. 318.
United States v. *Bush*, 269 Fed. Rep. 455.
United States v. *Kraus*, 270 Fed. Rep. 578.
United States v. *Slusser*, 270 Fed. Rep. 818.

To seize and imprison a man's person and subject him to interrogation is no less violative of the Fourth Amendment than a seizure of his papers.

The protection of the Fourth Amendment "reaches to all alike, whether accused of crime or not, and the duty of giving it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws" (*Weeks* v. *U. S.*, *supra*, at p. 392). As this Court said in the *Silverthorne Lumber Co.* case, *supra*, 251 U. S. at 391, the use in evidence of matter obtained in violation of the Fourth Amendment

> "reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

And in *Weeks* v. *United States, supra,* the Court said at page 393:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value and so far as those thus placed are concerned, might as well be stricken from the Constitution."

In *United States* v. *Slusser, supra* (where it was held that consent to a search by an official demanding it as of right was not a waiver of constitutional rights), District Judge Peck said (270 Fed. at 819):

> "An unlawful search cannot be justified by what is found. A search that is unlawful when it begins is not made lawful when it ends by the discovery and seizure of liquor. It was against such prying, on the chance of discovery, that the constitutional amendment was intended to protect the people.
>
> "Neither is the discretion of the officer, however good and well-intentioned, a substitute in law for a search warrant issued by a proper magistrate. It is to the latter the law has committed the discretion to say when a warrant shall issue; and it can only issue on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized. Constant reiteration of these fundamental principles is warranted by the fact that they seem to be so frequently overlooked. * * * A seizure without warrant * * * is an unlawful seizure and cannot be the basis of a valid forfeiture."

The principles of these cases were applied in a deportation case in *Ex parte Jackson,* 263 Fed. Rep. 110. District Judge Bourquin held that the summary character of deportation proceedings afforded no excuse for invasion of constitutional rights. He said (263 Fed. at p. 113):

> "The law and the courts no more sanction such evidence than such methods, and no more approve of either than the thumbscrew and the rack. Otherwise the vicious circle of age-old tyranny—to subject to and convict by unlawful means because guilty, and to condemn as guilty because subjected to and convicted by unlawful means, to which both alien and citizen fall victim. The Declaration of Independence, the writings of the Fathers of our Country, the Revolution, The Constitution and the Union, all were inspired to overthrow the like governmental tyranny. They are yet living, vital, potential forces to safeguard all domiciled in the country, alien as well as citizen."

CONCLUSION.

The order appealed from should be reversed and the writ of habeas corpus sustained.

Dated, October 1, 1923.

Respectfully submitted,

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80 East 11th Street,
New York City.

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 92.

THE UNITED STATES OF AMERICA ex rel. MICHAEL BILOKUMSKY, Appellant,

against

ROBERT E. TOD, Commissioner of Immigration at the Port of New York, Respondent.

REPLY BRIEF FOR APPELLANT.

The brief for the respondent misapprehends our main argument. We do not suggest that this case raises the question of constitutional immunity from self-crimination in criminal cases.

It seems advisable to state with distinctness some of the points left partly to implication in our main brief.

1. The old Immigration Rules, permitting *ex-parte* examinations (which this Court held not *per se* unconstitutional, but by no means approved, in *Low Wah Suey vs. Backus*) have been rescinded.

2. The rules now in force (page 7 of our main brief) evince an intention to provide safeguards which the old rules did not. They do not authorize any imprisonment or exercise a domination by Immigration Inspectors prior to the issuance of a Warrant of Arrest. They accord with the Fourth Amendment in requiring probable cause for an arrest. They provide for *immediate* hearing upon arrest, at which the arrested person shall *forthwith* be apprised of his right to counsel and permitted to inspect, and consider with counsel, the evidence relied upon as probable cause. They thus, and doubtless for similar reasons, enact a policy analogous to (but not identical with) that of the constitutional privilege against self-crimination in criminal cases. While it retains these rules, the Department of Labor must live up to them.

3. In this case these rules, and the Fourth Amendment, were evaded. Whatever the legality of Bilokumsky's imprisonment by the Philadelphia authorities, Immigrant Inspector Reiss had no right to become a partner in it. He did so when he took advantage of the "full and complete cooperation" of the Philadelphia authorities, and had Bilokumsky brought before him in Moyamensing Prison for interrogation under oath. This was an unconstitutional seizure and search by him

of Bilokumsky's person. It could not have been sanctioned even under the old Immigration Rules. Inspector Reiss, moreover, did the very thing which the substitution of the new rules was designed to prevent. He examined Bilokumsky *ex parte*, as if at a hearing under a warrant, without apprising him of his right to counsel, or permitting him to inspect and take advice upon any showing of probable cause for believing him to be a deportable alien.

4. This clear deprivation of the safeguards provided by the present rules was a denial of their due process and application. It is manifest that there was no election by Bilokumsky, with knowledge of his rights under the rules, to waive them. Whether Bilokumsky's responses were "voluntary" when measured by the rules which determine the admissability in evidence of confessions in criminal cases, is in this aspect immaterial.

To say, however, that the responses of an ignorant laborer to the questions, or commands, of an official who had summoned him in prison and caused him to be sworn, are *voluntary*, or that he may be presumed to know that he is under no legal compulsion to answer, shocks the sense of reality.

Such overreaching *ex parte* interrogations, in cases which are not criminal and in which there has been no showing of probable cause for regarding the subject as a deportable alien, are pregnant with dangers of oppression more grave than those of the "third degree" in dealing with suspected criminals.

Notes on Cases in Respondent's Brief.

Judge Westenhaver's opinion in the *Kosopud* case, 272 Fed. at 336 (respondent's brief page 6), doubtless following the line of argument presented to him, treats the question rather as of the admissability of confessions in a quasi-criminal case than as of the due process and application of the immigration rules. He lays down a broader rule in favor of the admissability of statemenst of arrested persons than other District Courts have done—a broader rule than does the decision of this Court (Wilson vs. United States, 162 U. S., 613), which he cites. This Court there stressed the fact that there was affirmative evidence that the statements were voluntary, and intimated (page 623) that there might be a contrary presumption if, as here, an oath had been administered by the examiner.

In *U. S. ex rel Rakics vs. Uhl,* 266 Federal, 646, it does not appear that the question of due process and application of the immigration rules was raised.

The extract from *Fong Yue Ting vs. United States,* 149 U. S., 698, 730 (pages 8 and 9 of respondent's brief), might seem, taken without context, to support the extraordinary proposition that in deportation proceedings generally the Fourth Amendment and the principals of due process of law may be disregarded. But the context makes it evident that Mr. Justice Gray meant nothing of the sort. He was holding simply that the Chinese in the particular case was not denied due process

of law or subjected to unreasonable search and seizure by the Act of Congress requiring Chinese to register themselves, and authorizing their deportation unless they could establish their right to remain by the testimony of a credible white witness. It goes without saying that an arrest for deportation would have to be preceeded by a showing of probable cause for believing the subject to be an alien, and one who had not complied with the conditions imposed by Congress on his continued residence here.

The discussion and authorities in the respondent's brief bear no relation to our primary contention that a proceeding conducted in clear violation of the Labor Department's own rules violates the principles of due process of law. The Fourth Amendment was also violated, and, even irrespective of the violation of rules, there is strong ground for holding the proceedings violative of due process of law.

Respectfully submitted,

WALTER NELLES,
ISAAC SHORR,

Attorneys and Counsel for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1923.

THE UNITED STATES OF AMERICA EX rel Michael Bilokumsky, appellant,
v.
ROBERT E. TOD, COMMISSIONER OF IMMIGRATION at the port of New York, et al.
} No. 92.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appellant was arrested by the authorities of the State of Pennsylvania on April 26, 1921, and charged with a violation of the Sedition Law of Pennsylvania. He was promptly afforded a hearing before a committing magistrate and held under bail for his appearance before the Court of Quarter Sessions of Philadelphia, a State Court of Criminal Jurisdiction. (Rec. 22.) Three days later, on April 29, while he was being held in Moyamensing Prison awaiting trial before that Court, an immigrant inspector of the United States interviewed him in a room within the prison. The appellant was sworn and

interrogated and a stenographic record of the questions and answers was made. In the course of this examination, which was exceedingly brief and direct, he admitted that he was an alien, but denied that he had done anything which rendered him liable to deportation. (Rec. 31–33.) Shortly thereafter he was called to appear before the Court of Quarter Sessions. That Court, evidently being of the opinion that the public interest would be better served by the relator's deportation than by his imprisonment, referred the case to the United States authorities. (Rec. 24.)

The Secretary of Labor, on May 14, 1921, issued his warrant for the arrest of the appellant upon the ground that he was an alien having in his possession for the purpose of distribution printed matter which advocated the overthrow by force or violence of the Government of the United States. The warrant was authorized by sections 1 and 2 of the Act of October 16, 1918, c. 186, 40 Stat. 1012, as amended June 5, 1920, c. 251, 41 Stat. 1008. Upon this warrant the defendant was arrested and taken into the custody of the United States. He was then called for a hearing to show cause why he should not be deported. The rules of the Department of Labor, which provide that at the beginning of the hearing he shall be allowed to inspect the warrant of arrest and be advised of his right to have counsel (Rec. 40), were strictly observed (Rec. 13). His counsel was present. Under advice of counsel he declined to answer any questions whatever. (Rec. 14.) All

of the facts necessary to prove that he had in his possession for the purpose of distribution printed matter which advocated the overthrow by force or violence of the Government of the United States were fully presented in due form at this hearing. There was but one element of proof lacking, namely, that the appellant was an alien. To supply this evidence of his status the inspector offered the admission made by him under oath on April 29. An order of deportation followed, to prevent which the appellant sought a writ of habeas corpus.

The issues raised by the record are thus stated in appellant's brief (p. 4):

> The single point involved in this appeal is that the examination of Bilokumsky at Moyamensing Prison and the use of it in the subsequent deportation proceedings were contrary to the Fourth and Fifth Amendments to the Constitution of the United States.

It is significant that the appellant has not denied, either in his petition for the writ or in his amended traverse to the return, that he is an alien. He does not aver that by threat of force or promise of reward he was induced in an unguarded moment to make a false statement. The inference is strong that he is in fact an alien and that he comes before this court not as one who has been deprived of any real and substantial right, but as one who hangs his case upon the barest technicality.

ARGUMENT.

I.

The appellant was not subjected to unreasonable search and seizure.

It is contended by the appellant that his examination by an immigrant inspector of the United States at Moyamensing Prison on April 29, 1921, was an unreasonable search and seizure contrary to the guaranty of the Fourth Amendment, and that, accordingly, the fruits of this examination could not lawfully be used against him in any subsequent proceedings. The contention overlooks the fact that on April 29 the relator was lawfully restrained of his liberty by the Commonwealth of Pennsylvania, in the custody of its officers, awaiting trial before one of its criminal courts. It is not the case of a defendant who has been arrested without a warrant and illegally searched or examined. His imprisonment was lawful, and there was no unreasonable search or seizure. He was not in the custody of the immigrant inspector, but was interviewed and examined by him in the same manner as he might have been in his own home or as any other person lawfully detained in prison may be examined.

The fact that his detention was lawful removes his case from the rule that the Government can not use the fruits of an illegal search and seizure in any subsequent proceeding against the person searched, and leaves for determination only the question whether the statement was voluntarily made.

It has been held in a number of cases that the examination of an alien without advising him of his right to have counsel and to decline to answer questions does not render his statement involuntary or make it inadmissible as evidence to support a deportation order.

In *Low Wah Suey* v. *Backus*, 225 U. S. 460, the petition for the writ of habeas corpus, as stated in the opinion (pp. 469–470), alleged that the alien "was refused the right to be represented by counsel during all stages of the preliminary proceedings and was examined without the presence of her counsel and against her will by the immigration officer at the Port of San Francisco, and before she had been advised of her right to counsel and before she was given an opportunity of securing bail, and that afterwards an examination was conducted by the immigration officer, acting under the orders of the Commissioner of Immigration, at which she was questioned by the immigration inspector against her will and without the presence of counsel, who was refused permission to be present, and that at certain stages of the proceedings she was refused the right to consult with counsel." A demurrer was filed. It was the unanimous opinion of this Court that no constitutional right of the relator had been infringed and that an order of deportation based upon testimony so obtained, was valid.

In re Kosopud, 272 Fed. 330 (District Court, N. Dist. Ohio, E. Div., Westenhaver, J.), certain aliens, who had been arrested before formal written war-

rants were in the possession of the arresting officers were interrogated without the presence of any counsel representing them, and the statements then made were afterwards used in evidence. The orders of deportation based thereon were sustained. In the course of the opinion it is said, at page 336:

> Nor do I perceive any good reason why the arresting officer may not lawfully interrogate or examine the person arrested with respect to the charge made against him, even though the alien is not then represented by counsel and is under arrest. This is the usual course in criminal proceedings. Whether his statements thus made may be given in evidence against him depends upon whether or not they were voluntary. They will be presumed to have been made voluntarily unless the contrary appears, and they will be held to be involuntary only when shown to have been induced by threat, promise, or encouragement of hope or favor. The absence of counsel, the fact that the prisoner may not have been warned that he was not required to make a statement or that if he did it might be used against him, or that he was under arrest and restraint do not by themselves prevent the statements from being voluntary or make them incompetent as evidence. (See *Wilson* v. *United States*, 162 U. S. 613.)

In *United States ex rel Rakics* v. *Uhl*, 266 Fed. 646 (C. C. A., Second Circuit), the relator, being in prison at the time (p. 649), was examined on March 23, 1919, by a special agent of the Department of Justice,

and his examination, in question and answer form, was stenographically reported. A warrant of arrest was not issued until May 5, and the hearing was not held until May 7, 1919. The statement made on March 23 was introduced in evidence in the proceedings, and it does not appear that counsel or the District Court or the Circuit Court of Appeals saw any impropriety therein.

The examination of the relator in the instant case was brief, fair, and without any element tending to suggest duress or compulsion, or tending to show that his statement was an involuntary one.

II.

The appellant was not compelled in a criminal case to be a witness against himself.

The complaint of the appellant goes further, however, and urges that the use of his statement made on April 29 was in violation of the immunity from self-incrimination guaranteed by the Fifth Amendment. Ten cases are cited in his brief (p. 14), which hold that the provisions of the Fourth and Fifth Amendments "run almost into each other," and that papers which have been obtained by an illegal search or seizure can not afterwards be used in evidence against their owner in any criminal case or case brought to recover a fine, penalty, or forfeiture. An examination of these ten cases discloses that all of them were criminal cases, and that the ground for excluding the evidence was that the defendant was thereby deprived of

his constitutional immunity from self-incrimination. *Gouled* v. *United States*, 255 U. S. 298, 306, is typical.

These decisions are not applicable to the case at bar for two reasons. First, as we have already observed, the evidence here was not obtained as the result of an illegal search and seizure. Second, the constitutional immunity extends only to criminal cases and prosecutions for fines, penalties, or forfeitures.

It is well settled by the decisions of this Court that deportation proceedings are not criminal cases. In *Fong Yue Ting* v. *United States*, 149 U. S. 698, Mr. Justice Gray said (p. 730):

> The proceeding [deportation] * * * is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property,

> without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.

In *Bugajewitz* v. *Adams*, 228 U. S. 585, Mr. Justice Holmes said (591):

> The attempt to reopen the constitutional question must fail. * * * The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the Government to harbor persons whom it does not want. The coincidence of the local penal law with the policy of Congress is an accident.

To the same effect are—

> *Colyer* v. *Skeffington*, 265 Fed. 17, 23.
> *Skeffington* v. *Katzeff*, 277 Fed. 129, 131.

The immunity from self-incrimination guaranteed by the Fifth Amendment applies only to criminal cases and not to deportation proceedings.

III.

The appellant was not deprived of his liberty without due process of law.

It is urged by counsel for the appellant that he was deprived of his liberty without due process of law (1), because the rules of the Department of Labor were not followed in interviewing him on April 29, and (2) because, aside from these rules, the use of his statement then made is contrary to fundamental

principles of justice. Neither of these contentions can be sustained.

(1) The rules in question are printed in appellant's brief at page 7. It is to be noted that they provide what procedure shall be followed *after* a warrant of arrest has been issued by the Secretary of Labor. The purpose is to provide that counsel may be present throughout the making of the *formal record* on which an order for deportation must be founded. By their terms they do not apply to any investigations, examinations, or interviews made before the issuance of the warrant.

The record in the instant case shows that these rules were scrupulously observed from the time of the issuance of the warrant. Accordingly, the point which counsel make, that the Department did not follow its own rules, is not well taken.

(2) It is further urged, however, that the use of the relator's statement was "inconsistent with the fundamental principles of justice embraced within the conception of due process of law." (Brief for appellant, p. 11.) The argument of this proposition overlaps those which have preceded. The bases for the contention are (*a*) that the relator was not advised of his right to have counsel, and to remain silent if he desired, and (*b*) that the effect of the proceeding was to make the relator a witness against himself.

(*a*) The first of these two grounds is fully met in *Low Wah Suey* v. *Backus*, 225 U. S. 460, in which this Court sustained the former rules of the Department

of Labor which specifically provided for the private examination of an alien, and held that his constitutional rights were not infringed so long as he was permitted at some time during the hearing, and before the final order was made, to have counsel and to produce witnesses.

In *United States* v. *Sing Tuck*, 194 U. S. 161, the Court sustained the departmental regulations relating to the exclusion of Chinese. Mr. Justice Holmes said, at pp. 169, 170:

> The rules objected to require the officer to prevent communication with the parties other than by officials under his control, and to have them examined promptly touching their right to admission. The examination is to be apart from the public, in the presence of government officials and such witnesses only as the examining officers shall designate. * * * The separate examination is another reasonable precaution * * *.

(*b*) Nor does the fact that the use of his testimony may have the effect of making him a witness against himself deprive him of due process of law. The immunity from self-incrimination is not included in the legal content of "due process of law." In *Twining* v. *New Jersey*, 211 U. S. 78, 106–114, the subject is fully discussed, and it is held that the privilege of immunity from self-incrimination is not an immutable principle of justice which is the inalienable possession of every citizen of a free government, but is a constitutional right, applicable only

in criminal cases, which is separate, independent, and outside of due process of law.

The record is barren of any circumstance which can arouse sympathy for the relator because of unfair treatment. Caught redhanded in an attack upon the Government of the United States and the security of American institutions, he comes before our Courts, not upon the plea that he is innocent, nor that he is a citizen born or naturalized, but solely upon the ground that his status, which he can not deny, was proved by a method not technically correct. Such a plea merits scant consideration.

CONCLUSION.

The decree of the Court below was correct and should be affirmed. The appellant was not subjected to an unlawful search or seizure, was not required in any criminal case to be a witness against himself, and was not deprived of his liberty without due process of law. The order of deportation made by the Secretary of Labor, upon evidence legally competent and after a full and fair hearing, is valid, and should be sustained.

JAMES M. BECK,
Solicitor General.
GEORGE ROSS HULL,
Special Assistant to the Attorney General.

OCTOBER, 1923.

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UNITED STATES EX REL. BILOKUMSKY *v.* TOD, COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 92. Argued October 19, 1923.—Decided November 12, 1923.

1. In proceedings by the immigration authorities to deport a person charged with being an alien within the United States in violation of law, alienage is a jurisdictional fact, which must be found, to sustain an order of deportation. P. 153.
2. The burden of proving alienage in such proceedings (with a statutory exception in Chinese cases), is on the Government. *Id.*
3. When an essential finding of fact in such proceedings is unsupported by evidence, the courts may intervene by *habeas corpus*. *Id.*
4. Where a person, arrested for deportation as an alien within the United States in violation of law in that he had in his possession for distribution printed matter advocating overthrow of the Government by force or violence, upon being called and sworn as a witness, by the Government, to prove his alienage, stood mute,—*held*, that admission of alienage, which is not an element of the crime of sedition, would not have tended to incriminate him, and that the immigration officers might properly have inferred the fact of alienage from his silence. P. 154.
5. Deportation proceedings are civil in character and the person arrested may be compelled by legal process to testify whether he is an alien. P. 155.
6. Mere interrogation under oath by a government official of one lawfully in confinement is not a search and seizure. P. 155.
7. The rules of the Secretary of Labor concerning deportation cases do not require that a person under investigation prior to application for warrant of arrest, shall be advised of his right to have

counsel and to decline to answer questions, before being interrogated as to his alienage. P. 155.

8. The use in evidence in a deportation proceeding of an admission of his alienage made previously by the person held for deportation, while he was in custody of state authorities,—*held*, not to render the hearing unfair, in view of corroborative evidence and his failure to deny alienage at the hearing. P. 156.

9. A person held for deportation by immigration officials will not be discharged on *habeas corpus* merely because the warrant of arrest was issued without probable cause, if the later proceedings were regular and afford sufficient ground for his detention. P. 158.

Affirmed.

APPEAL from an order of the District Court discharging a writ of *habeas corpus* and remanding the relator and appellant to the custody of the Commissioner of Immigration.

Mr. Walter Nelles, with whom *Mr. Isaac Shorr* was on the briefs, for appellant.

Mr. George Ross Hull, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Bilokumsky is said to have entered the United States in 1912. In May, 1921, he was arrested in deportation proceedings upon a warrant of the Secretary of Labor as being an alien within the United States in violation of law. The specific ground was having in his possession for the purpose of distribution printed matter which advocated the overthrow of the Government of the United States by force or violence. Act of October 16, 1918, c. 186, §§ 1 and 2, 40 Stat. 1012, as amended June 5, 1920, c. 251, 41 Stat. 1008. After a hearing, granted to enable him to show cause why he should not be deported, a warrant of deportation issued. While in the custody of the

Commissioner of Immigration at the Port of New York, he filed in the federal court this petition for a writ of *habeas corpus*. That court heard the case upon the return and a traverse thereto; dismissed the writ; remanded the relator to the custody of the Commissioner; allowed an appeal; and stayed deportation until further order. The case is here under § 238 of the Judicial Code, the claim being that the relator was denied rights guaranteed by the Fourth and Fifth Amendments to the Federal Constitution.

Prior to the application for the warrant of arrest in the deportation proceedings, Bilokumsky was confined to Moyamensing Prison, Philadelphia, on charges made by city authorities that he had violated the state sedition law. While there he was sworn and interrogated by an immigration inspector who took a stenographic report of the examination. In answer to questions so put he admitted that he was an alien, but denied that he had done anything which rendered him liable to deportation. There is nothing in the examination which suggests that Bilokumsky made his statement because of threats or promises of favor; and there was no evidence that the statement was an involuntary one, unless compulsion is to be inferred from the fact that he was at the time in custody; that city and federal authorities were then cooperating "with a view to ridding this country of undesirables"; that the prosecution under the state law was dropped soon after the institution of the deportation proceedings; that he was not then represented by counsel; and that he was not apprised by the inspector, either that he was entitled to be so represented or that he was not obliged to answer.

At the hearing under the warrant of the Secretary of Labor all facts necessary to establish that Bilokumsky had in his possession for purpose of distribution printed matter which advocated the overthrow of the Govern-

ment were proved by evidence to which there was no objection. To prove alienage the inspector called Bilokumsky as a witness. He was sworn; but when questioned by the immigration inspector, under advice of counsel, stood mute, refusing even to state his name. After his refusal to answer, the report of his examination in Moyamensing Prison was introduced, although duly objected to by counsel. He did not testify on his own behalf; nor did he, or his counsel, make the claim, at the hearing, that he is a citizen of the United States. The rules then in force dealing with the conduct of such hearings are copied in the margin.[1] So far as appears these were fully complied with. It is conceded that, if the fact of alienage was legally established, there was both probable cause for issuing the original warrant of arrest and ample evidence at the hearing to justify a finding that relator was within the United States in violation of law. The contention is that there was no legal evidence of alienage.

If, in the deportation proceedings, Bilokumsky had claimed that he was a citizen and had supported the claim by substantial evidence, he would have been entitled to have his status finally determined by a judicial, as distinguished from an executive, tribunal. *Ng Fung Ho* v.

[1] "Rule 22, Subd. 5(a). Upon receipt of a telegraphic or written warrant of arrest the alien shall be taken before the person or persons therein named or described and granted a hearing to enable him to show cause, if any there be, why he should not be deported. If the alien is unable to speak or understand English, an interpreter should be employed where practicable."

"Rule 22, Subd. 5(b). At the beginning of the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued, and shall be apprised that he may be represented by counsel. The alien shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the conduct of the hearing." Compare *Colyer* v. *Skeffington*, 265 Fed. 17, 46.

White, 259 U. S. 276, 281. But he made no such claim at that time; nor does he now contend, by allegation in his petition for *habeas corpus*, or otherwise, that he is a citizen of the United States. He rests his claim to relief on an entirely different ground. He asserts that, because of the manner in which the evidence of alienage was procured, the warrant of deportation is a nullity. He argues that alienage is essential to jurisdiction; that the Government has the burden of establishing the fact; that it can be established only by legal evidence; that his examination while in prison is the only evidence introduced for that purpose; that its procurement involved both an unlawful search and seizure and a violation of the rules of the Department; that since it was illegally procured it was not legal evidence; and, hence, that the order is void. Its nullity is urged on three grounds. Because the order is unsupported by legal evidence; because the hearing was unfair; and because the original warrant issued without probable cause.

It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact. *United States* v. *Sing Tuck*, 194 U. S. 161, 167. It is true that the burden of proving alienage rests upon the Government. For the statutory provision which puts upon the person arrested in deportation proceedings the burden of establishing his right to remain in this country applies only to persons of the Chinese race. See *Ng Fung Ho* v. *White*, *supra*, p. 283. (Compare Immigration Rules of May 1, 1917, Rule 8.) It is also true that if the Department makes a finding of an essential fact which is unsupported by evidence, the court may intervene by the writ of *habeas corpus*. *Zakonaite* v. *Wolf*, 226 U. S. 272, 274–5. But it is not true that, if the report of Bilokumsky's examination be eliminated, there was no evidence of alienage at the hearing. Conduct which forms a basis for inference is evidence. Silence

is often evidence of the most persuasive character. *Runkle* v. *Burnham*, 153 U. S. 216, 225; *Kirby* v. *Tallmadge*, 160 U. S. 379, 383. Compare *Quock Ting* v. *United States*, 140 U. S. 417, 420. Bilokumsky was present at the hearing, personally and by counsel. The ground for deportation involved a charge of acts which might have been made the basis of a serious criminal prosecution. Criminal Code, § 6. If Bilokumsky was a citizen, inquiry into the facts was immaterial; and the whole proceeding must have fallen. He, presumably, knew whether or not he was a citizen. Since alienage is not an element of the crime of sedition, testifying concerning his status could not have had a tendency to incriminate him. There was strong reason why he should have asserted citizenship, if there was any basis in fact for such a contention. Under these circumstances his failure to claim that he was a citizen and his refusal to testify on this subject had a tendency to prove that he was an alien.

Conduct is often capable of several interpretations; and caution should be exercised in drawing inferences from it. But there is no rule of law which prohibits officers charged with the administration of the immigration law from drawing an inference from the silence of one who is called upon to speak. Deportation proceedings are civil in their nature. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730; *Bugajewitz* v. *Adams*, 228 U. S. 585, 591. Neither statute nor rule requires that matter alleged in the warrant of arrest shall, in the absence of an express admission, be taken to be denied. A person arrested on the preliminary warrant is not protected by a presumption of citizenship comparable to the presumption of innocence in a criminal case. There is no provision which forbids drawing an adverse inference from the fact of standing mute. It is not unreasonable to assume that one who may wish to challenge the executive's jurisdiction in the

courts will not refrain from asserting in the proceedings before the executive the facts on which he relies. To defeat deportation it is not always enough for the person arrested to stand mute at the hearing and put the Government upon its proof. Compare *United States* v. *Sing Tuck*, 194 U. S. 161, 169. Since the proceeding was not a criminal one, Bilokumsky might have been compelled by legal process to testify whether or not he was an alien.[3] The Government was not obliged to adopt that course.

The introduction of Bilokumsky's examination as evidence did not render the hearing unfair. The specific grounds urged for holding it so are that the evidence was obtained by an illegal search and seizure and in violation of the rules of the Department. Both contentions are unfounded. It may be assumed that evidence obtained by the Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings. Compare *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Gouled* v. *United States*, 255 U. S. 298. But mere interrogation under oath by a Government official of one lawfully in confinement is not a search and seizure. It may be assumed that one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law.[4] But no rule is shown which prohibits interrogation without apprising the person under investigation that he is entitled to refuse to answer

[3] See *United States* v. *Hung Chang*, 134 Fed. 19; *Low Foon Yin* v. *United States*, 145 Fed. 791; *Law Chin Woon* v. *United States*, 147 Fed. 227; *Tom Wah* v. *United States*, 163 Fed. 1008; *In re Chan Foo Lin*, 243 Fed. 137, 140; *United States* v. *Brooks*, 284 Fed. 908, 910. Act of Feb. 5, 1917, c. 29, § 16, 39 Stat. 874.

[4] Compare *Whitfield* v. *Hanges*, 222 Fed. 745, 749; *Jouras* v. *Allen*, 222 Fed. 756, 758; *Mah Shee* v. *White*, 242 Fed. 868, 871; *Lum Hoy Kee* v. *Johnson*, 281 Fed. 872; *Sibray* v. *United States*, 282 Fed. 795, 797; *Ex parte Low Joe*, 287 Fed. 545; *United States* v. *Dunton*, 288 Fed. 959.

and to have counsel. The examination here complained of was conducted before there was an application for the warrant of arrest. There is neither in Rule 22, subdivision 3, which relates to the application for a warrant,* nor elsewhere in the rules, any provision which deals with interrogation prior to the hearing. Rule 22, subdivision 5(a) and (b), apply only to the proceedings after an arrest has been made. The careful provision which the rules make to ensure to the person arrested the benefit of counsel and access to the Government's evidence at the hearing leads to the conclusion that the omission of any similar provision governing earlier stages in the proceeding was intentional. In the absence of a rule forbidding interrogation, or requiring the presence of counsel, mere examination in his absence does not render the hearing unfair. *Low Wah Suey* v. *Backus*, 225 U. S. 460, 470.

It is urged that the admission of Bilokumsky's examination renders the hearing unfair because it is inconsistent with fundamental principles of justice embraced within the conception of due process of law. The argument is that if a judgment of deportation is to rest upon admissions attributable to the person to be deported, the admissions must have been made by him as a free agent and under circumstances which raise no doubt whether they were in fact made. Deportation is a process of such serious moment that on all controverted matters the executive officers should consider the evidence with close scrutiny. But here there was no denial of alienage; and a landing certificate was introduced by the Government which, when connected with the statement in Bilokum-

* "Rule 22, Subd. 3. *Application for warrant of arrest.*—The application must state facts showing *prima facie* that the alien comes within one or more of the classes subject to deportation after entry, and, except in cases in which the burden of proof is upon the alien (Chinese) involved, should be accompanied by some substantial supporting evidence."

sky's examination, tended in some respects to corroborate it. Moreover, the statement that one is an alien is not the confession of a crime. Except in case of Chinese, or other Asiatics, alienage is a condition, not a cause, of deportation. So far as appears, there was nothing in the circumstances under which Bilokumsky was examined which would have rendered his answer inadmissible even in a criminal case. The mere fact that it was given while he was in confinement would not make it so.[5] And since deportation proceedings are in their nature civil, the rule excluding involuntary confessions could have no application. *Newhall* v. *Jenkins*, 2 Gray, 562, 563. Moreover, a hearing granted does not cease to be fair, merely because rules of evidence and of procedure applicable in judicial proceedings have not been strictly followed by the executive; or because some evidence has been improperly rejected or received.[6] *Tang Tun* v. *Edsell*, 223 U. S. 673, 681. To render a hearing unfair the defect, or the practice complained of, must have been such as might have led to a denial of justice, or there must have been absent one of the elements deemed essential to due process. *Chin Yow* v. *United States*, 208 U. S. 8; *Kwock Jan Fat* v. *White*, 253 U. S. 454, 459. Compare *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91.

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[5] *Hopt* v. *Utah*, 110 U. S. 574, 585; *Sparf and Hansen* v. *United States*, 156 U. S. 51, 55; *Pierce* v. *United States*, 160 U. S. 355, 357; *Wilson* v. *United States*, 162 U. S. 613, 623; *Hardy* v. *United States*, 186 U. S. 224, 228–230. Compare *Powers* v. *United States*, 223 U. S. 303.

[6] Compare *United States* v. *Uhl*, 215 Fed. 573, 574, 576; *Choy Gum* v. *Backus*, 223 Fed. 487, 492–3; *Sibray* v. *United States*, 227 Fed. 1, 7; *United States* v. *Uhl*, 266 Fed. 34, 39; *United States* v. *Uhl*, 266 Fed. 646; *Morrell* v. *Baker*, 270 Fed. 577; *United States* v. *Uhl*, 271 Fed. 676, 677; *Chin Shee* v. *White*, 273 Fed. 801, 805; *United States* v. *Wallis*, 279 Fed. 401, 403; *Moy Yoke Shue* v. *Johnson*, 290 Fed. 621.

What has been said disposes also of the broader contention that the whole deportation proceeding was void *ab initio*, because without the report of Bilokumsky's examination there was lacking probable cause for issuance of the warrant of arrest. Irregularities on the part of the Government official prior to, or in connection with, the arrest would not necessarily invalidate later proceedings in all respects conformable to law. "A writ of *habeas corpus* is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment." *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 662; *Iasigi* v. *Van de Carr*, 166 U. S. 391; *Stallings* v. *Splain*, 253 U. S. 339, 343.

Affirmed.